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# **Rights protection and justice in contemporary China**

**Eva Maria Pils**

Thesis submitted for the degree of Ph.D.

University College London



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## **Abstract**

This thesis examines practices of dispute resolution and conceptions of justice internal to China, in order to understand the potential role of rights in the Chinese legal system. While rights assertion, defence and protection can only occur alongside dispute resolution practices already entrenched in China, they could also transform these Chinese practices, by encouraging a more tolerant attitude to public disagreement in dispute resolution.

A tradition of authoritarian supervision and control of officials is currently weakening the ability of Chinese courts to protect rights and to conduct principled argument about justice. Chinese culture has partly accommodated this supervisionist tradition by the practices of remonstrance with government, and mediation of civil and other disputes. But these latter practices also support attitudes opposing injustice and unjustified rule. It is argued that rights-assertive and empathetic attitudes are consistent and fundamentally connected. It may be right not to insist on what is due to oneself, and to seek conciliation. Yet when rights are asserted, they must be taken seriously. To take them seriously, sustained public disagreement about law and justice must be allowed.

As Chinese people are now increasingly rights-assertive, courts more often oppose the supervisionist tradition, by engaging in controversial legal argument and occasionally by adjudicating on the basis of constitutional rights and principles. This could help to correct some of the injustices done to the large and growing Chinese underclass, especially as remonstrance mechanisms are failing.

The Chinese example supports the conclusion that legal systems in transition are not best served by a 'thin' version of rule of law, but instead need a strong constitutional legal practice. This illustrates that law should not be defined by its claim to authority but by its function to serve justice.

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## **Chapter One      Introduction: the weak Chinese legal system**

*Justice.* This thesis offers a critical perspective on some prevalent attitudes toward legal development in contemporary China. Addressing Chinese academics and practitioners of law as well as jurists and sinologists, it is also a discussion of the status and nature of rights in a legal culture in transition.

We cannot truly understand the Chinese legal system unless we measure it by the most important aspiration of any legal system, justice, and try to understand the perspective of insiders to the system. This makes it important to identify some injustices that happen in China to date, and to understand people's reactions to these. We also need to respond to the fact that there is widespread disagreement about what justice requires, in China as well as outside China.<sup>1</sup> Over the past two decades, the idea of having legal rights protected by courts has been introduced into many ordinary Chinese people's lives as a novel idea, while many traditional ideas and attitudes remain important. Present injustices - for instance, the deprivation of farmers and migrants to the cities and of urban residents in redeveloping areas, state torture, persecution because of political or religious beliefs - as well as reactions to such injustices provide ample material for study.

So far as ordinary Chinese people are concerned, competing and sometimes conflicting conceptions of justice, law and good government translate into a mix of different and sometimes incoherent expectations from the administration of justice - from government, including the police and procuracies and the courts,

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<sup>1</sup> Practices aimed at justice must take people's different but reasonable expectations into account, for the simple reason that this is fair and therefore part of being just. One of the most famous recent accounts of fairness as an aspect of justice is Rawls, *A Theory of Justice* (Cambridge,

but also from the newly emerging professional class of lawyers. Conflicting attitudes are also evident from the rules intended to organise and give meaning to legal institutions. They are evident from what the law says, and from what legal professionals do. To give one example, Chinese law tells courts to judge independently on the one hand,<sup>2</sup> but it stifles judicial independence in many ways, on the other; not just because of corruption or because the government does not dare to give independence to judges, but because of a deep conviction held and acted on by many, that control of judges and control over judicial decisions are necessary to ensure the right judicial decisions. Chinese law contains many legal rules and practices inspired by this conviction. The conflicts just mentioned are so entrenched that some of the institutions we have to study, many of their practices and rules, do not make coherent sense. The stronger the opposed convictions that support judicial supervision and judicial independence, the weaker the integrity of the Chinese legal system. A just and better legal system would have to show a greater measure of coherence.

There are now several relatively recent systematic accounts of contemporary Chinese law in Western languages, which describe legal institutions, providing information and comment on their functions. Among these, the earlier works take a functional approach very much oriented toward a Western, for instance, an American model of a legal system. They might criticise, for example, the lack of political power distributions characteristic of Western political orders without really arguing in depth why such distributions were required. A typical example for this is Lubman's characterisation of Chinese

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Massachusetts: 1971). For a discussion of semantic convention, see Stavropoulos, 'Hart's Semantics', in Coleman, Jules (editor), *Hart's Postscript* (Oxford: 2001).

<sup>2</sup> See, for instance, Article 126 of the Constitution.

legal practices as ‘law as administration’:<sup>3</sup> although he does not very explicitly argue for separation of powers in China,<sup>4</sup> the implication of what he says is that judicial, legislative and administrative (executive) powers should be separated in a good political and legal order, which is why something is wrong, or at least odd, with ‘law as administration’.

Other, more recent accounts have reacted to such implicit assumptions by proposing that the ‘Ideal Western Legal Order’ (abbreviated ‘IWLO’), or that liberal democracy was not ‘necessarily’ the right model for China.<sup>5</sup> This was an appropriate criticism. But then the next step in this argument should have been taken: we should have been told what was wrong with the ‘Ideal Western Legal Order’ model in China, and this account would have given some normative – that is, action-directing – guidance as to what model should replace it. Instead Western legal research on China went largely into retreat from evaluation. Cautions against the use of ‘IWLO’ were sometimes supported by references to a branch of legal philosophy, whose aim has been generally to minimise the evaluative components of their descriptions of legal concepts.<sup>6</sup> From a positivist as well as from a relativist point of view, it seemed better not to address the simplistic question of whether a foreign legal system was good at delivering justice. ‘Rule of law’ could be dissociated from justice, and not to dissociate it made you look naive or unprofessional, because justice is such a notoriously controversial idea.<sup>7</sup>

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<sup>3</sup> A chapter heading in *Bird in a Cage* (Stanford: 1999).

<sup>4</sup> Lubman also says that it would be wrong to speak of a Chinese legal ‘system’ as such.

<sup>5</sup> Clarke, ‘When is a Riddle Just a Mistake’, in Hsu Stephen (editor) *Understanding China’s Legal System. Essays in Honour of J.A. Cohen* (New York: 2003).

<sup>6</sup> Most notably, of the concept of a legal system itself. Raz, *The Concept of a Legal System - An Introduction to the Theory of a Legal System* (2<sup>nd</sup> edition, Oxford: 1980).

<sup>7</sup> ‘PRC legal scholars often go beyond claiming that rule of law requires good laws to asserting that rule of law entails justice for all (...) Dong Yuyu, for instance, argues that ruling the country in accordance with law (*yifa zhiguo*) is not the same as rule of law (*fazhi*) (...) He believes that



'Although justice is a popular requirement for rule of law, there is little agreement over what justice is. Liberals, Socialists, Communitarians, Neoauthoritarians, Soft authoritarians, New Conservatives, Old Conservatives, Buddhists, Daoists, Neo-Confucians, and New Confucians all differ on what is considered just, and hence what rule of law requires. By incorporating particular conceptions of the economy, political order, or human rights into rule of law, thick conceptions decrease the likelihood that a consensus will emerge as to its meaning. Indeed, one of the reasons for limiting the concept of the rule of law to the requirements of a thin theory is to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice.'<sup>8</sup>

This presupposes that some shared views or, to use the Rawlsian phrase referred to by Peerenboom, some 'overlapping consensus',<sup>9</sup> are preconditions of shared practices, such as legal practices. It appears at best like a negligent misunderstanding, and at worst like a 'liberal' imposition to go beyond what could be expected to be agreed and suggest, for instance, that Chinese courts of law should be there to protect rights the way they do in *our* systems, by using independent judgement and the power to coerce. Rather it is assumed that we should mainly observe how practices are developing, and might at best attempt predictions.<sup>10</sup>

To some it seemed problematic even to discuss China's legal institutions as such: as 'legal institutions', especially if one was not happy to use 'thin' legal

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rule of law requires more - specifically, rule of law entails peace, order, freedom, and justice.' This passage immediately precedes the passage quoted in the main text, in *China's Long March Toward Rule of Law* (Cambridge: 2002), at p. 70. See also Peerenboom, 'Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China', 2002 *Michigan Journal of International Law* Vol. 23, 1, at p. 60.

<sup>8</sup> Peerenboom, *ibid.* Further support for the relegation of justice to 'thrones' in airy theory seemed to come from the fact of increasingly hypocritical claims of allegiance to communism as a moral and political theory in China, as well as from the Marxist notion of ideology, with its connotation of 'false consciousness' created by the ruling social class.

<sup>9</sup> Rawls, John, 'The Idea of an Overlapping Consensus', 1987 *Oxford Journal for Legal Studies* 1.

<sup>10</sup> This is the approach apparently taken by Pitman B. Potter in his *The Chinese Legal System: Globalisation and local legal culture* (London, New York: 2001). See for instance at pp. 14 f.

concepts, as Peerenboom does. To quote from Clarke's cautious discussion of the permissibility of using 'IWLO', as an example of the 'at best' version:

'The first assumption is that China has legal institutions. In other words the IWLO [Ideal Western Legal Order] approach assumes that (...) China has a set of institutions that can meaningfully be grouped together under a single rubric (...) More specifically, the very act of naming institutions involves drawing conclusions about them before the investigation has even begun. If we call an institution a court, then we are claiming that this word conveys to the listener a more complete and accurate picture than some other word. We could equally well call the institution a "team" or an "office" or a "bureau"; the decision not to use those words represents an implicit assertion about the nature of the institution in question. The problem is that this assertion precedes, rather than follows, an inquiry into the nature of the institution.'

(...) It is often said that Chinese judges lack judicial independence. The perception of this lack stems from an interpretation of the institution of Chinese courts and judges that sees them as embryonic courts and judges in ideal Western legal order.'<sup>11</sup>

From this perspective, it can also appear 'ethnocentric' to characterise the Chinese Constitution – or *xianfa* - as a document whose central principles must not be violated by any state institution.<sup>12</sup> No argument appears to remain, then, to support the claim that judges must respect the Constitution, for instance by refusing to apply laws that violate it or by handling cases in which claims are based solely on rights guaranteed by the constitution.<sup>13</sup> Controversial claims that the constitution *should* be accorded more respect in Chinese legal practice are

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where he makes predictive statements about the effects of 'globalized' legal norms 'borrowed from abroad' on 'local legal culture.'

<sup>11</sup> Clarke, 'When is a Riddle Just a Mistake', in Hsu (editor) *Understanding China's Legal System. Essays in Honour of J.A. Cohen* (New York: 2003), pp. 8 f.

<sup>12</sup> The characters for *xianfa* are 宪法. Recently, the Chinese constitution has been amended to enshrine respect and protection of human rights by the state as a principle, but this does not settle the dispute I am describing in the main text.

<sup>13</sup> From this perspective, too, it must appear that description is a more challenging, more intricate, perhaps even more honourable task than 'mere' evaluation. This is apparently Clarke's conclusion at the end of the essay I just quoted from.

therefore - unhelpfully - reduced to a mere report that some people *want* this to happen, while others do not.<sup>14</sup>

Important and genuine as the concerns raised here are, we should be careful not to misunderstand what it means to be in substantive disagreement about concepts such as ‘court’ and ‘Constitution’. It is therefore necessary to look more closely at Clarke’s argument about the use of ‘court’ and ‘legal system’ and ‘Constitution’. To persuade us that particular risks of imposing our ideals attach to talking about Chinese ‘courts’, etc, Clarke also asks us to imagine that instead of thinking of *shenpanyuan* as ‘adjudication officers’ – this is the standard translation for *shenpanyuan* -,<sup>15</sup> we try out thinking of them as ‘baseball players’. He points out that if we did, we would note very different deficiencies in *shenpanyuan*, than we would when thinking of them as judges. Thinking of them as judges we will complain, for instance, about *shenpanyuan*’s lack of independence, but if we thought of them as baseball players we might be more concerned with their physical strength, their ability to play in a team and so on.

The thrust of Clarke’s argument here is relativist. He rightly observes that the ideas of judges, courts and constitution connote ideas about what such institutions should be like and what relationships should obtain among them, and he observes, too, that there is a particular history of the use of these concepts in our societies. The point of the example of different references for *shenpanyuan* is not about correctly translating this term; it is that by using the same concepts with reference to foreign institutions that have foreign names, in foreign cultures, we distort our understanding of what these institutions really are. Therefore, in

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<sup>14</sup> Clarke, *ibid.* p. 20.

<sup>15</sup> 审判员. The standard translation for ‘judge’ is *faguan* (法官). A *faguan* is also a *shenpanyuan*, as is a People’s Juror (人民陪审员).

Clarke's view, it might be appropriately sensitive to cultural difference, say, to speak of Chinese *fayuan*<sup>16</sup> as offices or bureaus of some sort, rather than as courts, because 'court' has so many culturally specific connotations.

But note an important difference in possible disagreements about the use of these words or concepts: if you complained about the average Chinese *shenpanyuan*'s lack of baseball potential due to (say) his modest average height I would disagree with you, but I would probably not be induced to engage in any serious argument with you. I would consider you simply to have misunderstood 'shenpanyuan'.<sup>17</sup> By contrast, serious and significant argument about what *shenpanyuan* or judges should be like could not possibly be settled by pointing out linguistic or semantic mistakes or failures to observe linguistic conventions. The question what the purpose of courts and judges is in China, is not settled by the way we happen to use Chinese language. It would also be ridiculous to claim that judges were just, for instance, *only* because they were called Justices in some places.<sup>18</sup> Almost anything beyond the reassuringly common understanding<sup>19</sup> that we do not generally call judges 'baseball players', will have to be argued for, and may be essentially contested.<sup>20</sup> Indeed, many of the aspects we now value about the institutions of courts and judges and constitutions in our countries have had to be fought about over centuries, before they could become realities (think of the

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<sup>16</sup> 法院.

<sup>17</sup> I would be almost as little prepared to discuss with you, as I would to explain to you why judges were not fish. This is a straightforward linguistic or semantic problem, but not specifically a problem about translation from one language into another or of cross-cultural use of concepts. Dworkin has described this problem in his so-called semantic sting argument in *Law's Empire* (Harvard: 1986).

<sup>18</sup> Guest, 'Why The Law Is Just', (2000) *Current Legal Problems* 31-52.

<sup>19</sup> Stavropoulos challenges the idea that there is *anything* about the meaning of concepts that could not be challenged in a substantive way, in *Objectivity in Law* (Oxford: 1998).

<sup>20</sup> I am here restating an argument set out by Gallie in 'Essentially Contested Concepts', 86 *Proceedings of the Aristotelian Society* 1955-56, 167, and used by Hart in *The Concept of Law* (Oxford: 1961), Rawls in *A Theory of Justice* (Harvard: 1971), and Dworkin in *Law's Empire*

abolition of *in camera* court procedures, for instance). But the radical changes these institutions underwent did not generally prompt us to invent new words for them, as we continued speaking of ‘courts’ and of ‘judges’.

So there is nothing that should embarrass us, as serious and conscientious observers, about calling Chinese *fayuan* ‘courts’, speaking of the *xianfa* as ‘the Constitution’, and so on. Using these words could not possibly release us from the obligation to spell out what such institutions should be like, or why they are not as good as they could be, in a particular context. Conversely, it is not necessary to regard preferences voiced within China for greater respect for the *xianfa*, or for the International Covenant on Civil and Political Rights (hereafter, ‘ICCPR’) - another example used by Clarke - as though they were a matter of a kind of moral taste, like colour taste; or a matter of fashion or popular whim. Of course, ‘wanting’ constitutional principles to be respected and applied by courts is wanting something for a reason, and is open to discussion in a way tastes are not.

Once we allow ourselves to engage in an argument about what many people rightly value most about their legal institutions – namely, their aspiration to deliver justice – a discussion of such institutions as the Chinese constitution and courts can come alive. Many positions can indeed be taken in this argument; one important one among them is a legal positivist one.<sup>21</sup> Among the many questions to be addressed are the questions how personal conviction about what justice requires should influence a judge’s decision, whether the law to be

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(Harvard: 1986), to support their use of the ideas of concepts of which there can be a number of conceptions.

<sup>21</sup> Compare Waldron’s ‘Normative (or Ethical) Positivism’ and Perry, Stephen, ‘Hart’s Methodological Positivism’ both in Coleman, Jules (editor), *Hart’s Postscript* (Oxford: 2001) at pp. 410 and 311 respectively.

applied by judges should be determined by social sources, whether law has moral merit just by virtue of being law, being legally valid; and so on.<sup>22</sup>

Engaging in these arguments means doing more justice to many individuals caught up in China's legal practices and institutions, most notably many of its government and party officials. Being a Chinese judge, or a Chinese police officer or procurator, or even a Chinese law teacher, it seems difficult to avoid some degree of implication in injustice, even with the best intentions. There are bad, and even grossly unjust, laws to uphold or apply or teach to students; there are lines of argument not to be crossed if one wants to keep one's job. People directly challenged by a weak and erratic system, people who strive for its improvement and for the preservation of their personal integrity, who engage in often passionate discussion about how to improve, and devote their lives to this ambition, deserve respect. Little respect would be shown to them by relegating justice to an area of seemingly pointless disagreement with which foreign legal experts could have nothing to do.<sup>23</sup>

It is of course difficult to engage in this way; it is difficult even to begin describing what people's attitudes to injustice and conceptions of justice are. Yet the point of description is not – could not be – to provide an account reporting as many personal viewpoints as possible, or an account to which any significant number of people would assent, or which represented consented, shared views of any significant number of people. It has to be to indicate positions and concerns

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<sup>22</sup> These are all questions discussed in the context of legal positivism. See Dyzenhaus, 'The Genealogy of Legal Positivism', 24 (2004) *Oxford Journal of Legal Studies*, 39, for an account that distinguishes and relates them to each other.

<sup>23</sup> As Peerenboom does, apparently. '(...) In their reporting, Western journalists often impose their own values, and are quick to assume that actions not in accord with their values are tantamount of violations of international human rights law. Although violations of international human rights law and China's own domestic laws are occurring with troubling frequency, international human rights law is much less definitive on many important issues than is generally

relevant to a discussion, in order to be able to engage in it. In this attempt, one may look at institutions and practices and theories, prepared not to find a coherent and impersonal conception of law, rule of law, or justice 'behind them', but rather expressions of differences and disagreement.

*History.* It is also necessary to be aware of China's history of philosophical and jurisprudential debate, which includes a debate of rights.<sup>24</sup> Both China's more ancient and its more recent history are full of highly controversial discussions about what matters most to justice and good government, and it appears that actual legal institutions in Chinese history, such as the practice of the *yamen* magistrate or the practice of the imperial compilers of case notes to the imperial codes, have been focal points of disagreement among Chinese people throughout their history. It is hardly possible in this context to identify any particular theory or school of thought as 'the official one'. Precisely the fact that this is so frequently attempted with Confucianism in China may be due to the peculiar preoccupation of Western legal scholarship with identifying what is perceived to be authoritative theories. What matters more than authoritative endorsement, at least for the purposes of the present discussion, is what ideas and lines of argument in Chinese cultures have remained forceful and are still used to justify legal practices.<sup>25</sup> Forceful new ideas and arguments, such as that of rights

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assumed by non-lawyers.' Peerenboom, Introduction to *China's Long March Toward the Rule of Law* and <http://www.international.ucla.edu/asia/article.asp?>.

<sup>24</sup> To be important, rights do not need to have been recognised by any number of people or over any stretch of time. But for an account of the now over a century old history of human rights debate among Chinese intellectuals and academics, see Marina Svensson's recent book *Debating Human Rights in China: A Conceptual and Political History* (Lanham and Oxford: 2002).

<sup>25</sup> In a way also much oriented toward authoritative endorsement, a sort of official synthesis of Confucianism and Chinese Legalism is often supposed to have taken place. The rough date for this synthesis is the beginning of the second Han period, the first and second centuries. This period came after a brief period of explicit imperial endorsement of Legalism by Qin Shi Huang



protected by courts, have produced conflict but also the possibility of new debate about justice and law.

This thesis considers such contemporary debates, and there is one 'traditional' idea which is particularly important to the argument advanced here. A central idea of Kongzi, Confucius,<sup>26</sup> and one that has remained important in China, is that one must show regard for other people, especially by not insisting too much on what is due from them to oneself. One must be prepared to give way, and to settle matters amicably. As 'what is due to oneself' is perhaps one of the most general and pertinent ways of expressing claims based on justice,<sup>27</sup> this is important to everything else that can be said about justice in Chinese societies. It does not at all mean that the idea of what was due to oneself and others did not play an important role. How could it possibly not be important? Indeed, many historiographs of 'Confucianism' have also emphasised the importance of giving each what is due to them according to their respective position towards oneself. Kongzi's moral philosophy can perhaps be used to support a general precept not to *force* moral demands upon one another, by using the – justified, but coercive and hence potentially violent – mechanisms provided by imperial (governmental) legal institutions.

A tension between the imperative requirement of doing justice and the more persuasive requirement of yielding is reflected, I think, in many

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Di, the first emperor to unite China, and was characterised by explicit endorsement of Confucianism, but implicit acceptance of many Legalist thoughts.

<sup>26</sup> Kong Qiu, or Kong Zi, Kong Fu Zi, or Confucius (551-479 B.C.). After him, the two most important Confucian scholars of the era before the first emperor (221 B.C.), were Meng Zi (Mencius, 371? - 289? B.C.) and Xun Kuang (or Xun Qing or Xun Zi, probably 298-238 BC).

<sup>27</sup> *Zheng* (正), 'uprightness, correctness', *yi* (义), 'justice, righteousness', and *gong* (公), 'publicness' are components of modern words for 'justice'. 'The idea of *yi* is rather formal, but that of *jen* [ren, 仁] (human-heartedness) is much more concrete. The formal essence of the duties of man in society is their "oughtness" because all the duties are what he ought to do. But the material essence of these duties is "loving others", i.e., *jen* or human-heartedness.' Fung Yu-lan, *A Short History of Chinese Philosophy*, edited by Bodde (New York: 1948), p. 42.

contemporary discussions about the Chinese legal system.<sup>28</sup> The connection between understanding what is due to oneself, and understanding how one should act towards others, is also of central importance to rights theories, as is discussed in Chapter Three.

These thoughts also matter to the image of ideal government as a caring institution, as well as to the traditional idea of magistrate courts (*yamen*). In the Confucian tradition, imperial magistrates were characterised as *the father and mother official*, or as *the official close to the people*. At the same time, the image of good government officials was influenced by the precepts of the most important 'Legalist', Han Feizi.<sup>29</sup> One of his central thoughts, which occupies much of the discussion of later chapters, was that people should be governed indirectly through control of the officials,<sup>30</sup> and that control must also be exercised by means of certain rules which particularly specified punishment, and which applied to all, *fa*.<sup>31</sup>

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<sup>28</sup> This tension just mentioned not only led to numerous rules in magistrate legal practice, designed to deter people from litigation. Some of these were specifically directed at lawyers helping ordinary people to prepare claims before the magistrate; they could be punished if these claims turned out to be wrong. Throughout Imperial times, lawyers ('litigation masters', 'litigation tricksters') were subjected to a lot of official as well as popular contempt and hostility. Macauley's *Social Power and Legal Culture. Litigation Masters in Late Imperial China* (Stanford: 1992) gives a very detailed account.

<sup>29</sup> *Fajia* or the 'Law School' or 'School of Method'. Its most important representative was Han Fei (Han Fei Zi), who lived until 233 BC, and who was a disciple of Xun Zi.

<sup>30</sup> *Ming zhu zhi ling bu zhi min* (明主治吏不治民). Tan Shigui (谭世贵) discusses this in Tan Shigui, *Sifa fubai fangzhi lun* (司法腐败防治论), *On the prevention of corruption in the administration of justice* (Beijing: 2003) at p. 4. Bodde and Morris discuss *xingming* (刑名), which they explain as the idea of [a correspondence between] performance and title – and the consequent requirement for punishment when accomplishment falls short of (assigned, claimed) work. Bodde and Morris, *Law in Imperial China* (Cambridge, Massachusetts: 1967) p. 20.

<sup>31</sup> Against the background of natural law and positivistic theories of law in Western cultures, one has often attempted to see Confucianism as presenting a rule of 'rites', or of *mores*, *li*, and to see Legalism as presenting an idea of rule by law, *fa*. Many moved from this insight to the claim that the Confucian idea of *li* was opposed to the idea of rights. See for instance Ames, 'Rites as Rights: The Confucian Alternative', in Rouner (editor), *Human Rights and the World's Religions*. ed. (Notre Dame: 1988), 199. But see also the more cautious account of *li* in Hall and Ames, 'A Pragmatist Understanding of Confucian Democracy', in Bell and Hahm Chaibong, *Confucianism for the Modern World* (Cambridge: 2003). I think this kind of juxtaposition is confusing, especially so far as it focuses on a supposedly fixed metaethical status of law and of rites or conventional morality, according to authorship (authority): to understand *fa* as laws made by

Western scholars researching Chinese law of the (late) imperial period in the 1960s therefore saw it primarily as criminal law,<sup>32</sup> and this perhaps helped to explain why there was no perceived need for judicial independence in imperial China. The belief that Chinese imperial magistrate courts were centrally institutions for criminal punishment dominated the major account of Imperial Chinese law produced at that time.<sup>33</sup> The state appeared reluctant to meddle in 'civil disputes', or where it did, it appeared that such 'civil' disputes tended to be converted into criminal matters by the substance as well as the procedures of imperial law. Many institutions within 'society' as juxtaposed with imperial government, such as clans and guilds, took care of resolving disputes in ways generally characterised as arbitration or mediation.<sup>34</sup> It seemed very important that such organisations did not have the authority of imperial government, and consequently, what they did was sometimes also characterised as 'informal' law or as 'social' as opposed to 'legal' institutions.

More recent research has shown that imperial courts, despite the general emphasis on settlement, were involved to a much higher degree than previously

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rulers appears simplistic, as appears the understanding that *li* as norms inherent to morality are somehow created by, or exist in virtue of, social, general acceptance. Kongzi's idea of right conduct was also, for instance, expressed by being able to draw a parallel from oneself to others. Indeed the very objection of legalists against followers of Kongzi, that rule by *li* came down to rule by men, could be read as a restatement of the objection against understanding both *fa* and *li* in a simplistic way, which I just mentioned.

<sup>32</sup> It should be noted that many Chinese legal scholars concur in this view, for which there are of course many good reasons. To give an example of the pervasiveness of this perception, the constitutional legal scholar Cai Dingjian spoke of China's having passed through a 'criminal law stage' of legal history, and its now entering a 'constitutionalist stage', in a speech entitled 'Constitutionalism in China's Modern History, and China's Constitutionalist Future (*Zhongguo jindai de xianzheng he dangqian de xianzheng zhi lu*, 中国近代的宪政和当前的宪政之路)', on 30 July 2004; partly reprinted in Li Yaqiong 李雅琼 'China stands before a constitutionalist era (*Zhongguo zhanzai xianzheng jieduan menkou*, 中国站在宪政阶段门口)', Southern Metropolitan (南方都市报), available at <http://www.nanfangdaily.com.cn/southnews/jwxy/200407310131.asp>

<sup>33</sup> This idea dominates Bodde's and Morris's account in *Law in Imperial China* (Cambridge, Massachusetts: 1967), for instance.

<sup>34</sup> For instance by Sybille van der Sprenkel in *Legal Institutions in Manchu China: a Sociological Analysis* (London: 1967).

thought in the handling of ‘civil’ cases – disputes among citizens themselves.<sup>35</sup>

The largely customary rules governing land transactions, for instance (a highly important area of dispute given the importance of agriculture) had evolved under the influence of the imperial codes and the directives by imperial government. But the rules in the codes largely stated punishments for certain kinds of behaviour. Imperial government may not have been concerned with telling people, or perhaps even felt unable to tell people, what they owed each other, by means of the provisions of the imperial legal codes. But even so, of course, people can still have been owed certain things or forms of conduct, or might owe to others. The idea of yielding could not obliterate the idea of a certain conduct being due.<sup>36</sup>

Even if imperial government showed explicit concern mainly with stipulating punishments in the imperial codes, punishment and persuasion to yield must be seen as connected, as two ways of taking indirect influence to get a person to do what he ought to do. These ways of influencing another are particularly important against a background assumption that conduct owed by a person as a matter of (moral) duty ought to come from their free decision – that it matters whether respect or caring, for instance, are practiced with real commitment, or genuineness, that could not be replaced by mere unwilling

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<sup>35</sup> Compare Philip Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford: 2001), and Randle Edwards, ‘The Role of Case Precedent in the Qing Judicial Process As Reflected in Appellate Hearings’, in *Understanding China's Legal System. Essays in Honour of Jerome Cohen* (New York: 2003), 180.

<sup>36</sup> Perhaps one should also mention the importance of ‘not over-doing’, in this context. According to Fung (Feng) Yu-lan *dao* (道), the way, is based on a fundamental opposition of being and not being, and ‘among the laws that govern the change of things, the most fundamental one is that “when a thing reaches its extreme, it reverts from it.” *Ibid.* p. 97. This idea that “reversing is the movement of the *dao*” also explains the idea of *wuwei* (无为), ‘non-activity’ or ‘not over-doing’. This may have an impact on the way in which social conflicts are treated by central government, as well as by the parties to disputes: as already expressed by the idea of *xisong* (息讼) and *xi shi ning ren* (息事宁人), ‘letting matters rest and set people at peace’, there is a point in shifting the focus away from the seemingly main issue of a conflict. See also Chapter Four.

obedience to commands.<sup>37</sup> The fact that punishment and persuasion seem related as different ways of taking an influence on another's mind should not prompt one too readily to assume that there was no tension between a 'Legalist' emphasis on punishment and 'Confucian' emphasis on persuasion and education. It is even more difficult to accept that the disagreements resulting from this tension could have been settled sometime in the first century.<sup>38</sup>

The importance of imperial legal tradition for contemporary practice is now more emphasised by contemporary Chinese scholars. As communism loses its influence on Chinese society including academia, scholars will now make direct references to legal tradition, and explicitly advocate making use of traditional practices.<sup>39</sup> An example particularly in point for this thesis is the way in which judges are subjected to control and supervision in order to prevent what is generally referred to as corruption. For instance, traditional techniques of grading, rewarding, disciplining and punishing play a central role in a recent work on the prevention of judicial corruption.<sup>40</sup> Other academics write about

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<sup>37</sup> Fung (Feng) Yu-lan characterises the term which above I mentioned as one of those translatable as 'justice', namely *yi* (义), as 'social rightness', and says it connotes that the right thing is done with a motivation or purpose to do the right thing. It is sometimes translated as 'righteousness'. Feng Yu-lan, ed. by Derk Bodde, *A Short History of Chinese Philosophy* (New York: 1948), at p. 42: 'Righteousness (*yi*) means the "oughtness" of a situation. It is a categorical imperative. Everyone in society has certain things which he ought to do. If, however, he does them because of other non-moral considerations, then even though he does what he ought to do, his action is no longer a righteous one. To use a word often disparaged by Confucius and later Confucians, he is then acting for "profit". *Yi* (righteousness) [义] and *li* (profit) [利] are in Confucianism diametrically opposed terms...' A common combination is *yiwu*, 义务, which translates as 'duty'; further combinations of *yiwu* with other words bring out both aspects of *yi* as what ought to be done, and what is done freely because it ought to be done: e.g. 'compulsory education' and 'volunteer service'.

<sup>38</sup> Bodde and Morris note that by the time of the Tang Dynasty, the breach between Confucianism and Legalism had been 'effectively closed.' *Ibid.* p. 20.

<sup>39</sup> A new 'traditionalism' could be said to have developed since the mid-eighties. See the account given by Xue Yong (薛涌) in 'How much does the "Traditionalist Party" really understand of tradition? ("Chuantongpai" dui chuantong liaojie duoshao?, 传统派对传统了解多少?)', in *Southern Metropolitan* (南方都市报) of 6 May 2004, available at <http://www.nanfangdaily.com.cn/southnews/spqy/200405060108.asp>.

<sup>40</sup> Tan Shigui (谭世贵), *On the prevention of corruption in the administration of justice (Sifa fubai fangzhi lun, 司法腐败防治论)*, (Beijing: 2003).

Confucian ideas of management and supervision, seeking to connect their account to far more recent theories of governance and government.<sup>41</sup> There are also new proposals to develop a system for the official compilation of selected court decisions, made under supervision and to be corrected by superior courts where necessary, which seem to borrow features from China's imperial tradition.<sup>42</sup> After a long time of being too dangerous to be discussed, Chinese legal tradition is coming alive again to be discussed critically in relation to politics, law and economics, rather than cautiously narrated and reported on as part of China's 'feudalist' past.

This is of course not to say that Chinese communism or that related officially propagated ideas (socialism, Marxism, Mao Zedong Thought, Deng Xiaoping Theory, Jiang Zemin's Three Represents, and so on)<sup>43</sup> were no longer important. All officials, at least, must still state their allegiance to it, and some ideas of communism such as for instance state control over land as crucial to subsistence, play a very important role in current legal practice. Another important remaining element is Mao Zedong's distinction between contradictions among the people, which can be resolved by peaceful means and must be

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<sup>41</sup> For instance, Sun Juyou, (孙聚友), *The Confucian School's Philosophy of Management* (*Rujia guanli zhexue xinlun* (儒家管理哲学新论) (Jinan: 2003).

<sup>42</sup> Du Yulu and Yang Yemao (杜裕禄, 杨叶茂), 'Thoughts on the establishment of a system of precedent with guidance function in China' (*dui jianli woguo panli zhidao zhidu zhi sikao*, 对建立我国判例指导制度之思考), available at <http://www.chinacourt.org/public/detail.php?id=109555>.

<sup>43</sup> For a good introduction to Mao Zedong connecting his thought to his life see Jonathan Spence's *Mao Zedong* (London: 2001) and for a classic discussion see Schram, Stuart R., *The Thought of Mao Tse-Tung*. Cambridge: 1989). A good, brief account of Deng's reform and central ideas is given in Goldman, Merle and Fairbank, John King, *China. A New History* (Cambridge, Massachusetts: 1999) at pp. 406 ff. See also Stefan Landsberger's introduction, 'Deng Xiaoping Theory', at <http://www.iisg.nl/~landsberger/dxpt.html>. with further references. Extensive online archives for both figures are available at the website [http://www.websitesaboutchina.com/main/poli/politics\\_1\\_1.htm](http://www.websitesaboutchina.com/main/poli/politics_1_1.htm). The *Three Represents* (see also Chapter Nine) were first launched in a speech by Jiang Zemin in February 2000. An account of this can be found at [http://www.websitesaboutchina.com/main/poli/politics\\_1\\_1.htm](http://www.websitesaboutchina.com/main/poli/politics_1_1.htm). and Landsberger provides an account of the theory in his 'Jiang Zemin Theory ("Three Represents")', at <http://www.iisg.nl/~landsberger/jzmt.html>.

resolved by distinguishing between right and wrong, and contradictions between the people and its enemies, in which right and wrong are inappropriate categories, and which must be resolved with force.<sup>44</sup> This distinction matters particularly to mediation and to criminal law practice, and is accordingly addressed in my discussion of both. Both the increasingly untenable 'communist' claim that the state will administer resources according to an interpretation of the ideal of equality, and the Maoist idea of enemies to good society, now form part of Chinese legal culture. Just as the idea of and the many institutions for state control and supervision and punishment of officials they, too, weaken the ability of Chinese courts to protect Chinese citizens' rights.<sup>45</sup>

*Methods and Sources.* The argument in this thesis combines an abstract discussion of rights and justice with an interpretive discussion of some areas of Chinese law. The sources used for the – necessarily selective – account of current legal practice in China include textbooks, monographs, and contributions to periodicals. The most important source of information on cases proved to be newspaper reports, because some of the daily and weekly Chinese newspapers

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<sup>44</sup> To quote: 'The contradictions between ourselves and the enemy are antagonistic contradictions. Within the ranks of the people, the contradictions among the working people are nonantagonistic, while those between the exploited and the exploiting classes have a nonantagonistic aspect in addition to an antagonistic aspect (...) Since they are different in nature, the contradictions between ourselves and the enemy and the contradictions among the people must be resolved by different methods. To put it briefly, the former are a matter of drawing a clear distinction between ourselves and the enemy, and the latter a matter of drawing a clear distinction between right and wrong.' Mao Zedong, 1957, 'On the Correct Handling of Contradictions Among the People', (translation) in Selden, Mark, *The People's Republic of China: A Documentary History of Revolutionary Change*, New York Monthly Review Press, 1979, pp. 324 ff.

<sup>45</sup> Compare Lubman's assessment in 'The Study Of Chinese Law In The United States: Reflections On The Past And Concerns About The Future', 2 (2003) *Washington University Global Law Review* 1, at p. 18: 'It is necessary to explore contemporary legal culture very closely, even while relating it to Chinese tradition, because China is currently in the midst of an extraordinary institutional and social flux (...) Contemporary scholars – and China, indeed – must relate the Chinese cultural legacy to different contemporary values. The attempt is necessary even though both interpretation of the past and understanding of the present are contested, both in Chinese and in foreign legal scholarship.'



provide the most detailed and open reports available at all, especially on politically sensitive cases (such as the ones used in Chapters Five to Seven) A disadvantage of using case reports from the public media is that one has to rely on their accuracy and credibility. This problem could be reduced by using a number of different sources where possible, giving preference to reports that appeared in mainland Chinese media as well as media outside China, and choosing cases that appeared common or typical of certain problems. Of course extensive use has also been made of legislation at national and local levels. Where appropriate, references to international treaties and obligations according to international law are provided, although the present study does not primarily discuss the extent of such obligations, but rather examines the question how legal rights protection can become entrenched in China, from an internal perspective.

The selection that has been made of case material and exemplary topics has been greatly influenced by conversations with Chinese legal academics and professionals, visits to legal institutions, and classes and public lectures attended mainly in Beijing in 2003. Especially given the present incoherence of Chinese law, individual cases can serve better to explain the difficulties resulting from such incoherence, than the mere recitation or summarisation of legislation, or description of institutional arrangements. Moreover looking closely at individual cases allows one to get as close as possible to the perspective of people ‘inside’ the system, an approach important to this thesis especially when it discusses problems of rights assertion and the status of disagreement in dispute resolution.

The approach chosen here is interpretive, in the sense that an interpretation of some moral principles important to law and rights, such as the principle of

universalisability, informs an interpretation of current practices in China, such as mediation, remonstrance, rights discourse and rights protection. This approach emphasises that understanding the requirements of law is connected (though of course not as a matter of actual deliberation in every instance of interpreting law) to an interpretation of abstract moral principles. It relies mostly on what is called analytical political philosophy. In the present cross-cultural context, it emphasises that there are great uncertainty and disagreement about the most fundamental principles of law not only in the Chinese society in its current stage of reform and renewal, but also in seemingly more staid and conservative Western societies.

*Outline and main argument.* This introduction is followed by nine chapters. In the following two chapters, various Chinese attitudes to injustice are discussed and related to theories of rights and rights assertion. The central argument in this discussion is that a proper understanding of rights allows, rather than disables, one to see value in consensus and persuasion to do the right thing.

Chinese mediation as discussed in chapter four is a normative practice but cannot be understood as a legal rights protection mechanism. Chinese judges and other officials may sometimes use mediation in a manipulative and unfair way. But mediation *can* be a way of resolving disputes, which particularly takes the relationships between involved parties appropriately into account, and allows for adapting to the changing attitudes of parties to a dispute in the process of its resolution. This can be valuable, also in a judge.

Chapter five turns to a particular area of fundamental rights, to discuss in a case study if and how the rights of migrant workers are protected in Chinese law,

in the context of legislation, of mechanisms for appeals to governmental authorities, and of adjudication. This discussion draws attention to many Chinese people's transition from the countryside into China's expanding urban areas, and allows us to address the rights of a particularly large group of disadvantaged people in Chinese society. It is argued that because the egalitarian aims originally attributed to China's legal and political system are increasingly neglected, Chinese citizens' rights to free movement, to physical integrity, and to equality before the law are now in greater need of protection. This also requires a discussion of what a right to equality means in contemporary Chinese law. Improving legislation would be one way to effect better protection, but in this as well as in other areas, Chinese legislation is hampered by the absence of an effective distribution of legislative power. The system is best characterised by the idea of an extension or delegation of the power to rule – to issue orders, laws and regulations – from the top to the bottom. This results in great inconsistency and incoherence of the rules produced by various state authorities, especially those at the bottom end of the hierarchy. As it is 'extended', the power to rule is also thinned out, contributing to the present weakness of the Chinese legal system.

In the context of administration, the most important institution channelling citizens' reactions to injustice is remonstrance with government, through complaints and letters (*xinfang*, *shangfang*).<sup>46</sup> This unique institution reflects some Chinese attitudes to injustice<sup>47</sup> but is not, according to the argument in Chapter Six, an adequate institution for the protection of legal rights. The drama of its recent failures should not prevent us from acknowledging its potential

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<sup>46</sup> 信访, 上访.

<sup>47</sup> Which I try to identify in Chapter Two.

advantages, for instance, its flexibility and its assumption of a person-to-person relationship between government and citizens.

Chapters Seven and Eight are devoted to an analysis of courts' handling of cases with civil rights elements, and a further chapter addresses the changing role of lawyers as they are gradually meeting the challenge of protecting fundamental rights. This requires a discussion, among other things, of the changing status of the Chinese constitution and its rights guarantees, and some developments in criminal defence. It is argued that a non-positivistic understanding of constitutional rights could remove some perceived doctrinal obstacles to effective rights protection by Chinese courts. But as indicated above, the more important obstacles to such protection are conflicting ideas about how to run courts. Chinese courts are not *merely* Western style courts doing badly. There are vibrant ongoing debates about how to run courts and how to train, appoint, and supervise judges: these debates are necessarily also debates about what the point of adjudication is. Some of the proposals and current practices and doctrines threaten the sound development of independent, impartial and rights-oriented adjudication.

Some contemporary Chinese attitudes to justice indicate expectations from the most recently introduced legal institutions, which cannot be fulfilled.<sup>48</sup> But this alone does not warrant the conclusion that the Chinese, somehow burdened with a tradition little engaging in rights talk, did not want, need, or understand rights, or that the idea of rights had no moral force in China. Instead, this thesis argues that Chinese approaches to conflict provide one with interesting and important answers to the question what it means to have rights, to be rights-

assertive, especially towards government, and to protect rights through the use of state coercion.

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<sup>48</sup> Palmer, Michael, ““So, good people too may litigate?” Individual justice, legal change and the family in contemporary China’, inaugural lecture at SOAS, 12 June 2002.

## Chapter Two      Responses to wrongs and injustice in China

*Deciding what should be done.* This chapter discusses aspects of a 'Chinese' conception of justice with a particular reference to conceptions of rights. The underlying assumption in doing so is that the concept of justice is important in any culture but that there are different conceptions of justice.<sup>1</sup> Even when one agrees that something has been *unjust*, one may still have different reactions or attitudes to injustice.<sup>2</sup> Culturally characteristic responses to wrongs and injustice<sup>3</sup> point to specific conceptions of justice, but also to disagreement about justice within one culture. For instance, in contemporary China, some traditional attitudes appear to be in conflict with a commitment to rights protection.

Having a right generally means having meaningful options. Some have tried to capture this fact by the idea of a right to do wrong.<sup>4</sup> Logically at least, one can distinguish between what one has a right to do and what it would be right for one to do,<sup>5</sup> or what one *should* do. Having a right also implies a certain

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<sup>1</sup> This distinction goes back to Gallie, W. B., 'Essentially Contested Concepts', 86 *Proceedings of the Aristotelian Society* 1955-56, 167. Hart drew 'in effect' the same distinction in *The Concept of Law* (1<sup>st</sup> edition, Oxford: 1961) at p. 155/159; see his Postscript to the 2<sup>nd</sup> edition (1994) at p. 246, and Rawls followed him in *A Theory of Justice* (Harvard: 1971) at p. 5, and so did Dworkin in *Law's Empire* (Harvard: 1986) in his discussion in Chapter 2.

<sup>2</sup> In at least one point such attitudes have to be the same to be correct: anyone must reject injustice. Judith Jarvis Thomson maintains that in a moral context there are no good or bad 'attitudes', only correct or incorrect ones. This is a useful idea, since it reminds us that recognising there are different conceptions of justice does not release us from the obligation to find out which is the right one. Thomson, 'Reasons for Acting, Wanting, Admiring, Believing', public lecture, 26 and 27 May 2004, at UCL, London.

<sup>3</sup> 'Wrong' is more easily associated with the conduct of 'private' individuals than 'injustice'. But this thesis suggests in this chapter and the following that justice can be a personal virtue, and criticises the over-emphasis on public aspects or conceptions of justice, and therefore I use 'wrongs' and 'injustice' with little distinction.

<sup>4</sup> See Waldron, Jeremy, 'The Right to do Wrong', chapter 3 in Waldron, *Liberal Rights. Collected papers 1981-1991* (Cambridge: 1993). 'The cutting edge of a rights-claim is the claim that it entails about the wrongness of interfering with the action that the right-bearer has chosen. So what is defended or contested when a general right is in dispute is the claim that choice within a certain range is not to be interfered with. This claim in turn is usually defended on the basis of the importance of the choices in the range in question for the lives of the individuals who are making them.'

<sup>5</sup> Dworkin uses this distinction, for instance, in *Taking Rights Seriously* at p. 188.

degree of independence from what other people want: no one can make me agree to abandon my right, if I do not want to. This independence connects rights to duties,<sup>6</sup> and the idea of legal rights and duties enforceable in courts distinguishes asserting legal rights from making legal petitions.<sup>7</sup>

The distinction between what one has a right to do and what one should do is important also for understanding court judgements. A court decision confirming that a person has a particular legal right can be described as a judgement about what should be done. But to say that judges decide whether a claimant's claims were justified is more accurate in what could be called a rights-centred system of adjudication. The judge's decision confirms, as a matter of right, the rights someone is asserting. The judge does not make a comprehensive judgement about whether someone took the right decision in asserting that right in this way, or at least that judgement is not part of his judicial decision. To give an example, it is usually not up to the judge to decide if the greedy rich moneylender should assert his claims toward the poor old widow. There are some cases in which it turns out that the moneylender's assertion is some kind of 'abuse of right' and that, therefore, he does not have the legal right in question at all. But there are many more cases in which he does have it; even if he should, all things considered, refrain from making claims based on it.<sup>8</sup> This does not mean that the judge has to reproach himself for what has been someone else's decision, or that he cannot make his judgement in the conviction it is the right judgement

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<sup>6</sup> Below I argue against the idea that rights only 'exist' if there are corresponding obligations, though.

<sup>7</sup> It is important to an argument which is part of this thesis, that however well-functioning mechanisms for revision and 'self'-correction in government authorities might be, they will only be addressing the question of what should, all things considered, be done. They could not, therefore, by themselves be regarded as appropriate mechanisms for the protection of legal rights.



for him to make. What is important is that there is the possibility of discrepancy between the two kinds of judgement – about what one has a right to do, and what one should do -, as long as we do not have a general duty to be rights-assertive. And would it not seem very difficult to say that we should always claim what was due to us?

In the following, it is argued that certain Chinese legal practices focus on the question what should be done, rather than the question what rights one has. Concentrating on what should be done generates a strong pressure to reach public consensus about this question, whereas concentrating on rights leaves more room for public disagreement. This requires a further discussion of the possible impact of attitudes prevalent in China on rights protection, especially against the background of growing public dissent and unrest in China at the present time.<sup>9</sup> The third chapter turns back to the question of rights-assertiveness.

*Demanding justice and protecting rights.* Where the distinction between the questions what rights one has and what one should do is not specially emphasised, controversy and discussion are likely to be concerned immediately with what should be done. An example for this is the practice of seeking revision of governmental decisions by writing letters or lodging informal complaints in person, so prevalent in China. It is characteristic of a culture of remonstrance and petitioning, to which rights protection has been introduced as a new mechanism.<sup>10</sup> Reflecting this culture, but also a certain change in focus toward

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<sup>8</sup> 'Making' or 'asserting' claims is more concrete than 'asserting a right' but sometimes these expressions can be used interchangeably.

<sup>9</sup> On this, see Murray Scot Tanner, 'China Rethinks Unrest', 27 (2004) *The Washington Quarterly* 137.

<sup>10</sup> Another instance of an imperfect conjunction of administrative review and court review is the fact that China's *Administrative Reconsideration Law* does not provide mechanisms for the

rights, the Chinese Constitution guarantees in its Article 41 a broadly worded 'right to complain' to every citizen:

'Citizens of the People's Republic of China have the right to criticise and make suggestions regarding any state organ or functionary. Citizens have the right to make to relevant state organs complaints or charges against, or exposures of; any state organ or functionary for violation of the law or dereliction of duty, but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.

The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.

Citizens who have suffered losses as a result of infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law.'<sup>11</sup>

China has institutions - called offices for letters and visits to complain<sup>12</sup> - corresponding to this 'right', which have a very important function in Chinese legal practice. The right to complain is broad in its reference to 'relevant' authorities, but narrow in not pointing to any possibility to make complaints forceful by putting the power of legal courts behind them. In practice, what citizens demand and occasionally get through this mechanism can go beyond what rights protection in court would give them: for instance, as is explained below, a public recognition on the part of a government authority of having been in the wrong, or a personal apology. The letters and complaints practice also gives people an opportunity to seek the most powerful authority in place to lodge

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enforcement of reconsideration decisions in a way similar to the enforcement of court decisions made in the course of administrative litigation (court review of administrative decisions). In chapter 6, I discuss the implications of Article 32: 'The respondent [to the administrative reconsideration application] shall comply with the administrative reconsideration decision. If the respondent does not comply with it or delays compliance without adequate reason, then the administrative reconsideration authority or its superior administrative authority shall order the respondent to comply, setting a time limit for compliance.'

<sup>11</sup> I am using the translation available at Beijing University's *Chinalawinfo* webpage (*faliu xinxiwang*). See <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=46441>.

complaints; to do so informally and to restore, perhaps, a degree of trust between citizens and government by allowing for direct communication between them. The picture of the 'father and mother official' as a description of imperial magistrates<sup>13</sup> comes to mind here. The institution of making informal complaints, and of picking - as is apparently done to considerable degree in practice - the *actually* most potent authority at which to direct one's complaint, seems particularly useful in a context where power centres can shift and vary, and where personal influence, e.g. as a consequence of party membership or rank, also tends to fluctuate. The institution of complaints to government also institutes a kind of supervision over officials, by allowing 'meddling', to a certain degree, of officials with other officials' work, even outside relationships of administrative subordination.<sup>14</sup>

Article 41 also allows us to see important similarities between the letters and complaints mechanism and adjudication over rights in court. Weight is placed, implicitly, on the importance of being persuasive and in other words to provide reasoned argument - for of course a complainant will only be successful if he is believed to have a proper cause, and if the person addressed is in a position to persuade or order the official or authority originally producing a grievance, to revise their decision or to make amends. There is also an implicit recognition of the importance of the public realm, for instance in the phrase 'exposure'.

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<sup>12</sup> 信访局. Here is also a national Letters and Complaints Bureau, or Bureau for petitions.

<sup>13</sup> *Fumuguan* (父母官).

<sup>14</sup> The idea of supervising (governing) officials in order indirectly to govern the people comes to mind again. Tan Shigui discusses the idea of 'enlightened government by controlling the officials, not the people' (*ming zhu zhi ling bu zhi min* 明主治吏不治民), as formulated by Han Feizi, in traditional China. Tan Shigui (谭世贵) *On the prevention of corruption in the administration of justice* (*Sifa fubai fangzhi lun*, 司法腐败防治论), (Beijing: 2003), p. 4. While

Yet courts and offices to receive petitions make different uses of the public realm. For a complaint, it may be better to be indirect and informal, and to keep problems unpublicised. At the same time the complaint mechanism can utilise publicness in a special way: it can utilise the publicisation of a grievance, by a 'naming and shaming' technique.<sup>15</sup> One could try to see Article 41 as envisaging a gradated response. At the lowest stage, there is a non-public letter to an authority. At this stage non-publicisation of a dispute can help to prevent it from escalating. It can help to encourage citizens to overcome their fear of governmental authorities or some of their members just because there is a mechanism of direct communication: this can be an advantage in cases where people fear government or certain government officials. By instituting varying degrees of (non-) publicity for the resolution of an issue, on the other hand, one accentuates the effects of publicity when it is used to a high degree. At the highest stage, there is the now so frequent 'collective complaint' made by a few, a few dozen or hundred people in front of the building of some state authority to express challenge, outrage or, as the case may be, despair. Recent occurrences of public protests show that there is a point when the letters and complaints mechanism collapses, in cases of great public discontent, in which public dissent becomes strong and obvious.

*Apologies, confessions, and disagreement.* One day in October 2003 a small crowd had gathered around some demonstrators in front of a Beijing hotel. The

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they are not governed, it seems that the people are also not protected, as a consequence of this technique: government is, as it were, entirely a matter between officials.

<sup>15</sup> Apparently, central government in some cases encourages citizens to make complaints against local officials, to counter local corruption.

demonstrators - all, they said, belonging to the same family - displayed a scroll reading

*'Only One Hundred Thousand Yuan in Compensation for a Life.'*<sup>16</sup>

They said that they were demonstrating because a young man belonging to their family, an employee with the hotel, had been killed in an accident which, they said, was a hotel driver's fault; but then the hotel had intimidated its other employees into not giving witness statements,<sup>17</sup> and the police had refused further to investigate the matter. The hotel had given the family the stated sum of money in an 'agreement' drawn up about the circumstances of the death.

'So, do you want more money?'

'We don't want more money! We want an investigation! We want to know what happened!'

'Why don't you sue? The hotel? Or the police?'

'You don't understand. The police won't do anything. We are here to make them do something. We are not afraid. What we really want is *an apology*.'<sup>18</sup>

Compensation is often demanded to 'make up' for a wrong without being the primary object of a (legal) dispute. Traditional practices in China reflect this. For instance, van der Sprenkel reports that in village mediation in Imperial and Republican China, it was typically expected that the party 'awarded' a claim for

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<sup>16</sup> *Yi tiao shengming zhi chang shi wan yuan* (一条生命只赔十万元). This is the scroll as I remember it and I may be wrong about the figure. The average income in Beijing is considered to range around ten thousand Yuan *per annum*.

<sup>17</sup> A frequent problem because there is no legal obligation even in criminal matters to provide witness statements.

<sup>18</sup> The term *gongdao* (公道) used here most frequently translates into 'justice', 'reason'. But the special expression *yao yi ge gongdao* (要一个公道) should be translated as 'wanting an apology,' or more literally, wanting a public acknowledgement of what is (would have been) morally required. *Dao* combines with another character to mean 'to apologise' in *dao qian* (道歉).

compensation would not actually demand this money on pain of appearing undignified, and that the defeated party would (instead) arrange a banquet at his own cost.<sup>19</sup> 'Only one hundred thousand Yuan' does not indicate that this sum is not enough; it does not either, apparently, just say that money cannot compensate for a life. Perhaps it says that paying compensation has not been the right kind of response to what happened. Or it reflects the traditional belief that the right compensation for a life is a life.<sup>20</sup>

Note that the alleged facts of the case described above point to a criminal case – a case, perhaps, of negligent killing and of perverting the course of justice. Yet what the relatives of the deceased person have got is monetary compensation, and what they ask for – 'really' – is not punishment but an apology, *gongdao* – a public recognition of having been wronged by an injustice, and something that cannot easily be measured. It is not quite clear whom they want to apologise, but it is clear that they consider their deceased relative's employer to bear some responsibility, and are at the same time angry because the police have failed to investigate.

This seems to be a fairly common case – sufficiently common to allow the question: *what if* a legal culture is based on an assumption that an apology is a centrally important reaction to a wrong done to someone else? Compensation

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<sup>19</sup> She paraphrases a Chinese author writing in 1945 to describe the typical development of an arbitration process carried out by village leaders in a place in Shandong. 'First, he says, the invited or self-appointed village-leaders enquire into the background of the dispute and establish what is really at issue. Then they propose a solution based on past experience of such quarrels. Next comes the task of getting the parties to agree to a compromise, discovering how much each will concede and where the agreement can be struck. Then follows a party or a feast to mark the conclusion of the conflict, the expenses being borne by one party, if he admits to having alone been at fault, or shared, if both admit some responsibility. Thus the settlement is reached and publicised. Except among the poorest people, it would be undignified of the wronged party to accept compensation; his victory lies in the general opinion that he has the right on his side. In theory the feast is given to repay the mediators, but in fact it is an admission of defeat and an apology.' Van der Sprenkel, Sybille, *Legal Institutions in Manchu China. A Sociological Analysis* (London: 1967), p. 101.

may be understood to have a more symbolical meaning. It may also have a conciliatory, as well as a punitive function, in a way relating punishment and conciliation to the handling of individual guilt. From the perspective of Western criminal law practice, there are some apparent contradictions in the way we deal with the notion that comes central in our practice of criminal punishment. As a psychological notion, guilt is conventionally sometimes likened to an illness, an encumbrance of autonomy, something psychotherapy helps us to get rid of. But as a normative notion, guilt guides the judgement, for instance, of a criminal and of how he should be dealt with; to many of the practitioners of criminal law, guilt presupposes what has been termed the 'unencumbered' (autonomous) self. Psychologists may be aware of the fact that coping with guilt liberates, that victim and perpetrator may suffer from different sorts of guilt and that it is good if they can in some way be reconciled. But 'public justice' takes no notice of this 'merely' psychological problem. Justice as understood by many legal practitioners does not involve conciliation and liberation from guilt. What was characterised tentatively as a 'Chinese' practice of compensation and apologies as responses to injustice may teach us that justice in some cases requires conciliation, and even requires liberation from the feeling of guilt arising from having done injustice.

There is more evidence to show how entrenched a part of legal practice the giving and receiving of apologies is in China. The Chinese *Principles of Civil Law* list among the 'remedies' which a court can *order* a defendant (typically in civil litigation) to provide, a 'formal apology', and a 'formal apology' is also mentioned as part of the legally required compensation for certain kinds of

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<sup>20</sup> *Sha ren chang ming* (杀人偿命).

damages – to one’s personality or right to reputation - done by state organs, according to the *State Compensation Law*.<sup>21</sup> The seeking of justice in the form of an apology, especially from state officials who have wronged one, is viewed very critically by some legal professionals and intellectuals in China, even when they applaud the fact that people are becoming generally more litigious toward government. A commentator on the development of administrative adjudication over the last two decades states critically that

‘The persistence of the phenomenon of “not litigating against officials” is in essence due to a [persisting] problem with the right to complain and litigate.<sup>22</sup> The right to complain and litigate is conferred onto the people by the law as a right to be exercised legally and autonomously. In administrative litigation, the concrete administrative act complained against will be subjected to a review of its legality. Therefore, legality is the only measure by which it will be decided if the citizen wins the case. [However] in its development until today, people going to court in administrative litigation will change the goal of litigation from “winning the lawsuit” into “restoring public justice [by obtaining a public recognition of what is just; an apology]”’.<sup>23</sup>

<sup>21</sup> In Chinese, the expression for this is *pei li dao qian* (赔礼道歉). The *li* here is the *li* frequently translated as ‘rites’ or ‘morals’ or ‘etiquette, good behaviour’. For the *State Compensation Law*, see its Article 30, which requires the formal apology in cases of damaging someone’s name or someone’s good reputation (*mingququan, rongyuquan*, 名誉权、荣誉权). I understand that the right to reputation is supposed to vest in people with a public office, etc. See also Article 134 *Principles of Civil Law* which lists a formal apology generally as a remedy. See also Article 30 of the Supreme People’s Court’s 2000 judicial interpretation ‘On problems of compensation in cases of administrative and civil litigation’, judicial interpretation no. 2000/27 (*zuigao renmin fayuan guanyu minshi xingzheng susong zhong sifa peichang ruogan wenti de jieshi*, fashi (2000) 2 hao, 最高人民法院关于民事、行政诉讼中司法赔偿若干问题的解释), 法释 (2000/27 号), available at <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=31348>. It reiterates the relevant passage of Article 30 of the *State Compensation Law*. For an example see the case of unlawful detention of Huang Jingjia decided by the Supreme People’s Court in 2000, where the defendant, a State Procuracy at city level, is ordered to pay damages, and restore the applicant’s good name and formally to apologise to him. See the report ‘The case of criminal procedure court compensation for Huang Jingjia (*Huang Jingjia guojia xingshi peichang an*, 黄景嘉国家刑事赔偿案)’, available on the *Chinalawnet* webpage at <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=cas&Gid=33554843>.

<sup>22</sup> *Suquan wenti* (诉权问题). In several combinations *su* is used to refer to complaints brought against a variety of administrative and other authorities, and therefore not limited to litigation in court.

<sup>23</sup> Fan Fu [a pen name] (凡夫), ‘Looking back at 20 years of administrative litigation: the attitude of “even in cases of humiliation or death one must not litigate against officials” is becoming a thing of the past (*Wo guo xingzheng shenpan 20 nian huigu: “qusi bu gao guan!” cheng wang shi*, 我国行政审判 20 年回顾: “屈死不告官”成往事)’ available at [http://news.xinhuanet.com/legal/2004-02/23/content\\_1327635.htm](http://news.xinhuanet.com/legal/2004-02/23/content_1327635.htm). The expression used here is *taohui gongdao* (讨回公道). See above on *gongdao*, *pei li dao qian*.



As long as one concedes the process of adjudication in courts at all to be connected to the ideal of justice, it is of course not odd to seek justice there. But apologies at the order of a court do seem odd even if – or when – this is what ‘the restoration of justice’ requires. Most importantly, there is a problem with freedom of mind. While a court may order for public apologies, it seems that no court can order for an apology to be sincere, because it cannot order anyone to think a certain way or, indeed, to lie.<sup>24</sup>

A court-ordered apology can only make sense if the court’s judgement has a certain persuasive quality: if it seeks to produce sincere acceptance by all parties, while at the same time also being a public attribution (or negation) of responsibility or liability. This practice presupposes deference towards the court, as well as an ideal consensus over the result at the end of the adjudication process.<sup>25</sup> Even ordering the ‘losing’ party to make a formal apology *whatever* their secret misgivings be, may be a form of such public recognition or recognition by the court *through* the defendant; though as just noted, in such a case it will come at the price of risking hypocrisy. (It is difficult to imagine an intentionally hypocritical system.)

A public admission of wrongdoing – however small-scale the ‘public’ forum for this may be – must have been very important in a context where

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<sup>24</sup>If, say, German legislators decided to incorporate such a ‘remedy’ in the German Civil Code, it would probably take little time for the German Constitutional Court to be required to strike such legislation down, as violating the principles of human dignity and freedom of expression. Many areas of Chinese law, such as its foundations of civil law and general administrative law, have some resemblance to German law, for historical reasons.

<sup>25</sup> Compare with the claims to *Gegendarstellung* (to have an opportunity to present one’s own, contrary view) and *Berichtigungsanspruch* (claim to the correction of a misrepresentation of facts) available according to German civil law in cases of infringement of one’s personality right. This is even though German law is widely considered to provide high standards of the protection of personality rights and of personal honour in the Western legal world (and conversely to restrict

tradition did not provide courts as institutionally separate from 'administration', or the rest of government, to pronounce on wrongdoing. But even where such courts exist, one may reasonably feel that nothing could replace an *own* admission of wrongdoing on the part of the wrongdoer: this, we may at least infer, is what motivated Chinese legislators to make apologies legally available remedies at the order of a court, besides more tangible remedies such as monetary compensation. In the introduction I suggested that some Chinese conceptions of justice were more 'intimate' than the one supporting most of our legal institutions. This is what I meant: there is a person-to-person view of governmental injustice in China, making apologies particularly attractive, significant, and therefore important.<sup>26</sup>

The importance of apologies, and the practices centred in apologies, further confirm the importance of the public realm in Chinese society. Indeed the very word *gongdao* contains the character for 'public'. It may be appropriate to say that the public realm is used for confirming and enforcing standards of conduct applying in more private realms of life as well as in public ones, rather than for creating standards of conduct of its own: wrongdoing requires an apology by the wrongdoer as a matter of justice or fairness – as we require this in private, e.g. family, relationships quite uncontroversially. The possibility of sincere and sustained disagreement over what constitutes wrongdoing is rather neglected by such a practice, while the fact that there are wrong acts, which are wrong whether or not we recognise it, is emphatically affirmed.

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the right to free speech rather much. Compare Prinz, Peters, *Medienrecht: die zivilrechtlichen Ansprüche* (Muenchen: 1999).

<sup>26</sup> In Zhang Yimou's much noted 1992 Film *The Story of Qiu Ju*, the peasant woman Qiu Ju keeps saying, 'I only want an apology!' Here the expression used is *wo zhi yao yi ge shuofa* (我只要一个说法). It connotes 'explanation.'

The role of confessions in Chinese criminal law practice can give further insights into what is valuable about apologies, and how, on the other hand, demanding apologies and confessions can work to the exclusion of important rights protections. As a public recognition of having been at fault, apologies in the contexts we looked at above are similar to confessions, which have always played a very important role in Chinese criminal justice and continue doing so to date.<sup>27</sup> The right to silence, and the presumption of innocence are not protected in the Chinese criminal process.<sup>28</sup> According to Article 93 of the criminal procedure law, the suspect has the obligation ‘to answer questions truthfully’, and only the right ‘to refuse to answer such questions as have no connection with the case [then investigated].’ Tragically, this leads to the widespread use of torture. Song Yinghui writes in 2003:

‘The second factor [hampering the regularity of the criminal investigation process] is that the suspect’s statement is turned into almost the sole aim of the criminal investigation process. In order to obtain a confession even inappropriate [not legally available] measures may be taken, and at times this results in grievous violations of the suspect’s right to bodily integrity. In our law enforcement and judicial practice the reliance on confessions is very strong, almost to the point where “when one has not obtained a confession, this cannot be counted as having solved the case [*po’an*].”’<sup>29</sup>

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<sup>27</sup> For the legal tradition and the situation under imperial law see Rickett, William, ‘Voluntary Surrender and Confessions in Chinese Law: the problem of Continuity’, (1971) 30 *Journal of Asian Studies* 797.

<sup>28</sup> For classic discussions of this problem in post-1949 China see Cohen, Jerome Alan, *The Criminal Process in The People's Republic Of China 1949-1963. An Introduction* (Harvard: 1968), especially pp. 30 ff, and Gelatt, Timothy A., ‘The People’s Republic of China and The Presumption of Innocence’, 73 (1982) *Journal of Criminal Law and Criminology* 259. See also Chapters Seven and Nine of this dissertation.

<sup>29</sup> Song Yinghui (宋英辉), *Introduction to the Elements of Criminal Procedure (Xingshi Susong Yuanli Daodu, 刑事诉讼原理导读*, Beijing: 2003), at p. 329. Article 46 of the Criminal Procedure Law says that no conviction must be made solely on the basis of the defendant’s statement (confession), but this provision, which aims to reduce the use of torture to elicit confessions, is of little significance in criminal practice, besides obviously not preventing the investigators from extorting a ‘confession’ first and supplying some further evidence afterwards.

For decades, the saying 'who makes a clean breast (of his crime) will be treated leniently; who obstinately refuses to confess, will be treated harshly' was displayed on the walls of most Chinese police stations, that is, where suspects would be interrogated. Despite increasingly strong criticism, the attitude it expresses is still the norm with police officers,<sup>30</sup> and appears to be maintained by many members of the ordinary public, too. The traditional emphasis on confessions on the one hand, and progressive views requiring rights protection of criminal suspects and defendants on the other, are a good example for how the conflicts of attitude mentioned above translate into real conflicts in institutions and among people.<sup>31</sup>

*Public suicide and public protest.* Above it was suggested that complaint, exposure, remonstrance and apology did not make sense in the absence of an assumption that the other will be honest, and will listen. Unlike determining someone's rights, working out what should be done requires an assumption of an ultimately *common* effort, different from that of courts adjudicating rights; yet it would be particularly blind to deny that remonstrance, mediation and similar ways of handling conflicts can provide the framework for dissensus and protest against wrongs and injustice.

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<sup>30</sup> Shi Fei (石飞), 'Welcoming the demise of the principle 'who confesses will be treated leniently, who obstinately refuses to confess, will be treated harshly' (*Huansong "tanbai congkuan, kangju congyan" tuiwei*, 欢送“坦白从宽, 抗拒从严”退位)', available at [http://www.ah.xinhuanet.com/xinwen/2003-12/09/content\\_1313545.htm](http://www.ah.xinhuanet.com/xinwen/2003-12/09/content_1313545.htm), also emphasises the connection between this principle and torture in police detention, and the fact that this attitude is still prevalent.

<sup>31</sup> Chen Ruihua (陈瑞华) writes as follows. 'In the opinion of the author, the problem of criminal procedure in the final analysis is one that goes to the nature of the judicial system, especially the relationships between the Public Security Organs, the prosecution organs and the People's Court.' 'Major Issues Concerning the Reform of Criminal Judicature in China' (2000?) translated by Yang Yushen and revised by David Kelly, available at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=1720](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1720). (No date of publication is explicitly stated.)

A particularly dramatic form of demonstration against injustice, which helps to understand differences in attitude even better, is self-mutilation or suicide in public. As a form of accusing and passing judgement on others it has always been important in Chinese tradition, and has been employed to great effect in Chinese society in the recent past.<sup>32</sup> The degree of publicity with which this is done varies. Sometimes, suicides and self-mutilations appear as the morally acceptable alternative to revolt; sometimes these two responses to injustice combine. In recent months and years, for instance, suicides and suicide attempts at Tiananmen (the Gate of Heavenly Peace), have occurred rather frequently. One writer, resident in Beijing, claims that there were over ten 'self-immolation incidents' in 2003 on Tiananmen Square alone.<sup>33</sup> In November 2003 people who had created disturbances in Tiananmen Square, the centre of Beijing were tried and this was reported in the official Xinhua News agency news:

'Today two criminals who created disturbances in Tiananmen Square were convicted in first instance. (...) The unemployed Ye Guoqiang from the Xuanwu district of Beijing had already received administrative punishments and criminal punishments in previous cases. Between May and September of this year Ye Guoqiang successively went to the Beijing City Government, to the Gate of Heavenly Peace and other places on ten occasions, either for silent sit-ins, or for demonstrations, and several attempts on the part of the relevant authorities to criticise and educate him had no effect. To create a disturbance he jumped off the Western corner of Jinshui Bridge into Jinshui River at the Gate of Heavenly Peace. This caused a large crowd to gather and look on, which led to a great

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<sup>32</sup> The suicide rate in China is apparently 2.3 times the world average, according to a report by The Central News Agency, 'China suicide rate is 2.3 times the global average', posted on 18 November 2003 at <http://www.asianresearch.org/Articles/1697.html>. Of course, suicide can have many different motivations. For instance, the 2003 campaigns against corruption in government led to a large number of suicides. See Watts, Jonathan in *The Guardian*, 30 January 2004, 'Corruption Crackdown led to hundreds of Communist Party suicides' (in the first half of 2003), available at <http://www.guardian.co.uk/china/story/0,7369,1135066,00.html>.

<sup>33</sup> He Qinglian, 'Where is the Boom of the Chinese Real Estate Industry Coming from?', 8 May 2004 in *Epoch Times*, five-part Article posted at <http://english.epochtimes.com/news/4-5-9/21289.html>. According to another report, there were three such reports by mid-October. See the Agence France-Presse Article, 'Two More Suicide Attempts on Beijing's Tiananmen Square' at <http://english.epochtimes.com/news/3-10-22/11560.html>.

disruption of [public] order in the said area. Ye Guoqiang was apprehended on the spot by public security authorities.<sup>34</sup>

Only foreign media reports on the same incidents made clear that Ye's grievance related to an unlawful eviction and/or demolition of his home at the instigation of property developers, who had bought land use rights for the plot in question from the city of Beijing.<sup>35</sup> When we view it as the target of such actions – as perpetrator –, we must conclude that the Chinese state has conflicting interests in publicising the administrative and punitive measures against 'creating public disturbance' of this sort, and keeping the disturbances and their causes unpublicised. This is only one of the conflicts mentioned in the previous chapter. It easily translates into conflicts of attitude – desiring control, but also the protection of citizens – so characteristic of Chinese officials to date, and it contributes to the weakening of the legal system.

Many similar 'disturbances' occur in less central, but still public places in China. While Chinese society has always made use of the institution of taking matters into a more or less public arena, of a technique of 'shaming', the present conditions of technically easily available public media in increasingly large parts of the country<sup>36</sup> make these techniques far more threatening to government than

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<sup>34</sup> Li Yongjing and Li Huiwen (李永京, 李慧文), 'Two criminal creating disturbances at Tian'anmen convicted' (*Tian'anmen zhizao shiduan liang an fan bei pan xing*, 天安门制造事端两案犯被判刑, Xinhua, 28 November 2003), Xinhua, 28 November 2003, at [http://news.xinhuanet.com/legal/2003-11/28/content\\_1203464.htm](http://news.xinhuanet.com/legal/2003-11/28/content_1203464.htm).

<sup>35</sup> Compare the Agence France-Presse Article on the same case, *ibid.*: 'Xinhua News, and China Legal Daily did not mention that Ye Guoqiang's senile father had also been arrested for protesting, nor did they mention the relationship between Ye Guoqiang and several other Beijing protestors (...) They didn't interview the defendants' lawyers or family members either.' For a systematic account of the connection between demolition and protest see also Human Rights Watch in China's March 2004 report 'Demolished: Forced Evictions and the Tenants' Rights Movement in China', available at <http://hrw.org/reports/2004/china0304/>. It includes the case of Zhu Zhengliang from Anhui, who set fire to himself in front of the portrait of Mao Zedong on Tiananmen Square, on 15 September 2003, also as a protest against eviction and demolition.

<sup>36</sup> As I state in more detail in chapter nine, there are of course efforts to control the media.

they used to be. Changes in factual conditions of public life, especially the growth of public media, have turned mechanisms and techniques of complaint, remonstrance and exposure that used to work well into explosive weapons.<sup>37</sup>

The 'right to criticise' and complain under Article 41 of the Chinese *Constitution* has perhaps been more significant in providing forms for the expression of discontent, for some time, than the right to free speech (Article 39) and other civil liberties, which have not been receiving adequate protection.<sup>38</sup> But there are now great efforts at suppression and concealment of public dissent, as it appears to be growing out of control, and the right to make complaints, especially if 'complaint' takes the form of demonstrations or of self-mutilation or attempts at suicide, is being restricted.<sup>39</sup> This is not least because the number of incidents is increasing. A recent sinologist study based largely on Chinese police statistics, and corroborated in part by other data, concludes that 'mass incidents' are now occurring in tens of thousands of instances per year, and that there has been a 'clear trend' toward larger demonstrations, sometimes combined with public suicides or suicide threats, and some demonstrations involving 'hundreds, thousands, or even tens of thousands of protestors,' in the past few years.<sup>40</sup> Even though public suicide and 'mass petitioning' follow certain distinctive patterns, such as the gathering round certain official buildings, the repeated use of certain

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<sup>37</sup> While aware of Habermas's writing on the significance of publicity to modern and what he terms post-modern society (Habermas, *Strukturwandel der Öffentlichkeit*, Frankfurt: 1990) I am sceptical of his understanding of 'intersubjective' truth generated, so to speak, in public discourse.

<sup>38</sup> As the existence of letters and complaints offices in most government authorities indicates.

<sup>39</sup> Compare, for instance, a recently introduced police regulation in Xi'an, which provides for fines for threatening or attempting suicide in public places. Xinhuaawang, 'Xi'an: to climb up a high rise building and 'kill oneself' will no longer work (*Xi'an: palou "zisha" xing bu tong le*, '西安: 爬楼 "自杀" 行不通了'), at [http://news.xinhuanet.com/legal/2004-04/27/content\\_1442111.htm](http://news.xinhuanet.com/legal/2004-04/27/content_1442111.htm).

<sup>40</sup> Tanner, Murray Scot, 'China Rethinks Unrest', 27 (2004) *The Washington Quarterly* 137 at p. 141. In many instances protest is directed against eviction and land deprivation, but of course

forms of expression,<sup>41</sup> the ritualised methods of suicide (such as jumping from high-rise buildings in public places, self-immolation, and blowing oneself up in front of official buildings), and so on, they are of course not effective *procedures* for obtaining protection from injustice or, indeed, redress for rights violation. They are far removed from the suggestion of making a common effort to resolve a conflict, which appeared to be one of the potential merits of remonstrance and mediation mentioned at the beginning of this discussion; they appear to be less about ‘what should be done’ than pure accusations. Sometimes, as in the case of people opposing forceful eviction, they are expressions of uncompromising resistance. Developed out of the practice of ‘petitioning’, they are also less an expression of diversity of views than an expression of the failure of the legal system, and indeed, often the ‘petitioning’ addresses the courts themselves.<sup>42</sup> This brings us to the topic of the next section:

*Attitudes to moral and legal rights in China.* The phrase ‘attitudes to rights in China’ makes deliberate use of an ambivalence: what is meant here is both ‘attitudes to rights in China’ and ‘attitudes to *rights in China*’. These two senses are closely related. It is important to capture both in a discussion, for otherwise, discussion will be limited to a mere description of attitudes of people in China. There is ample evidence that the idea of legal rights protection has been catching

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there are many other causes, too, and individual reports often mention that the causes bringing ‘mass protesters’ together are diverse.

<sup>41</sup> One of these appears to be the use of the character *yuan!* (冤!) – ‘wrong!’ or ‘injustice!’ in red on white (shirts or scrolls).

<sup>42</sup> A discussion of the phenomenon of petitioning courts or petitioning for courts to act a certain way, addressing also individual and more orderly petitioning, can be found in Qiu Feng’s (秋风), ‘Breaking out of the vicious circle of litigation complaints (走出诉讼信访的怪圈), 10 July 2004 in *Southern Metropolitan* (南方都市报), available at <http://www.nanfangdaily.com.cn/southnews/spqy/200407100216>. See also the case of Ma Jiyun which is discussed in Chapter Five.



on in China, and people are increasingly prepared to use rights as sharp weapons in legal conflicts, and to go to court. This, and the great problems with effective rights protection in court, is the topic of much of the discussion in the following chapters. Yet given the prevalence, at the same time, of more traditional forms of conflict resolution and seeking justice, it is sometimes claimed that rights in China do not or cannot have the same meaning as in Western countries and legal institutions. The discussion in the following mostly addresses the level of abstraction at which concerns about conflicts or inconsistencies between Chinese attitudes to injustice and rights discourse (rights protection) should be discussed.

An extreme position appears to derive conclusions about the nature of rights in contemporary China from the supposed fact that there was no *concept* of rights in Chinese culture up to some rather recent point in Chinese history. In a rather early exposition of his approach, Peerenboom claims that rights ‘with Chinese characteristics’ are in some way determined by a protracted absence of ‘rights’ in Chinese language.<sup>43</sup> He quotes Macintyre on the conspicuous absence of such concepts in many languages and cultures.

“‘There is no expression in any ancient or medieval language correctly translated by our expression ‘a right’, until near the close of the middle ages: the concept lacks any means of expression in Hebrew, Greek, Latin or Arabic, classical or medieval, before 1400, let alone in Old English, or in Japanese even as late as the mid-nineteenth century.’”<sup>44</sup>

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<sup>43</sup> Again, it is actually quite difficult to maintain this. The *word* now used for ‘rights’ certainly can be traced back to the writings of Xunzi, though used there with a negative connotation, and generally translated as ‘power, profit’. See Angle, Angle, Stephen, *Human Rights in Chinese Thought: A Cross Cultural Inquiry* (Cambridge: 2002), and also my Chapter Three.

<sup>44</sup> Peerenboom, ‘What’s Wrong with Chinese Rights: Toward a Theory of Rights with Chinese Characteristics’, in Alston, Philip, *Human Rights Law* (Aldershot: 1996), 293, p. 301, note 37. The – famous – quotation is from Macintyre, Alasdair, *After Virtue: A Study in Moral Theory* (Notre Dame: 1981), p. 67.

He considers rights 'with Chinese characteristics' to be understood (and used) as only 'instrumental' in contemporary China. But it is difficult to understand why anyone could think that one could deduce the existence, or actuality, or practical importance of rights from the fact that there happened to be a word to express the idea of rights in some languages.<sup>45</sup> The existence of such words in many languages is as little evidence for that, as is the non-existence for the contrary: a lot more argument would be needed to explain why linguistic practices of this kind were significant to what was right for participants of the practice, and no such argument is provided. Conversely, even if a culture or language does have the term, this does not settle that something of importance is denoted by it. Even if our observation of public discourse and contemporary legal practice leave us with a sense that many Chinese people ignore legal rights, this does not by itself mean that rights – legal rights - are not important to Chinese people today.<sup>46</sup>

In the absence of *any* mechanisms or institutions that could serve the protection of legal rights, and in the absence, too, of *any* beliefs on the part of anyone in a particular society, that such rights are important, there might not be much point in discussing if rights 'existed' in such a community, although there can be reasonable disagreement about this question. But if there are institutions potentially capable of protecting legal rights, texts guaranteeing the protection of rights, and most importantly, people caring about them, disagreement will

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<sup>45</sup> In *Natural Rights Theories: Their Origin and Development* (Cambridge: 1979), Richard Tuck gives an account of early rights theories. His discussion brings out how controversial the understanding of rights was from the moment it began to be proposed as central to a political and legal theory (according to him, in the 16<sup>th</sup> century).

<sup>46</sup> A similar objection has to be made to Lubmans comment that '[t]he concepts of rights held by litigants, whether peasant household or urban entrepreneurs, may be less rigid than those of Western counterparts....Even notions of rights that seem diluted by comparison to Western ideal types could, however, still be useful – and perceived by claimants as being useful – in bringing about results considered to be just or fair in a Chinese context.' Lubman, *Bird in a Cage* (Stanford: 1999), p. 303. It is difficult to understand why it is 'useful' if results are 'considered'

concentrate not on the 'existence' of rights, but on how important they are, and on the requirements for their protection. This kind of disagreement connects to wider discussions about the nature and status of legal rights and moral rights. China is now in the second kind of situation, as the following chapters show.

There is an obvious way in which the question how significant rights are in practice depends on the availability of effective legal remedies. This, and its emphasis on legal rights protecting a *freedom* to make use of legal remedies as one wishes, must be why so many are attracted to Hart's conceptual argument about the tautological nature of 'moral right'.<sup>47</sup> The purpose of a moral right, which he identifies as providing merely a reason for creating a legal right, renders a moral right (including the basic and abstract 'moral' right which he has identified) weak or 'empty'.<sup>48</sup> Ultimately, according to this account, rights must be legal rights, and these are characterised by the availability of enforceable legal remedies protecting rights. The advantage of such an understanding in the

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to be just, or fair, 'in a Chinese context', as long as it is not clear if they *are* just in this context. Useful to whom?

<sup>47</sup> Hart, Herbert L.A., 'Are There Any Natural Rights?', chapter three in Waldron, Jeremy (ed.), *Theories of Rights* (Oxford: 1984), 79. (first published in *The Philosophical Review* vol. LXIV no. 2 (April 1955), pp. 175-91). 'The statement that the fact that a moral right exists is a reason why there ought to be a legal right, would when spelt out, amount to the statement that the reason why there ought to be a certain legal right is that there ought to be a legal right.' Note that the statement that a moral right is 'a reason' for there to be 'a certain legal right' is considerably weaker than that it is '*the* reason' why there should be a legal right.

<sup>48</sup> Because of his description of rights as 'existing' only when there is an obligation on the part of someone else, Hart finds himself in some difficulty to decide if one has a (legal) 'right' to do what oneself is obligated to do. He characterises such a right as a 'unilateral' right, following Bentham, but calls this use of 'right' 'odd'. See Hart, 'Legal Rights', in *Essays on Bentham, Studies in Jurisprudence and Political Theory* (Oxford: 1982), 162. Yet it is not difficult to talk about rights to do or not do something, even when one has an obligation to do that thing. Note the use of 'absolute' rights and 'relative' obligations in Continental civil law: I may have an absolute right to transfer ownership in my book to B, even when I have a relative obligation to A to transfer ownership to A.

If moral as well as legal obligations have a bearing on what one should do, legally and morally, then one sees how Hart's use of 'unilateral right' would have to be inflationary, to cover all those cases in which what one had a right to do was in some way wider (offered more options) than what one should do. If only legal obligation counts, on the other hand, then according priority to legal obligation over legal rights appears arbitrary and sometimes inaccurate. Both must come from some social source, e.g. legislative enactment, on this account (see just above on property right and contractual obligation).

present 'Chinese' context is the helpful stress it puts on the availability of coercion; on the sense that justice *must* be done and that rights *must* be protected. It seems nevertheless mistaken in its narrow construction of the contexts in which force may be used to protect rights (it appears that only state force may be used, and only to protect legal rights that have been 'created'), as well as in its exclusion of forms of conduct that respect rights without being accompanied by a supposedly authoritative threat of coercion.

All which one *can* do, sometimes, is to provide some kind of amends after the violation of a legal right has occurred; and the best one can do, sometimes, is to provide coercive protection against imminent rights violation. The legal mechanisms set up to protect legal rights reflect this. But it would be wrong to claim that *therefore* rights should be treated as nothing but entitlements to certain legal remedies, and hence 'legal' in 'nature'. The proposition that 'justice *must* be done' cannot by itself be a reason for denying that there are moral rights.<sup>49</sup> Respect for rights could rest on non-coercive measures or conduct, even though justice must be done; we would not, could not, conclude from the breakdown of a particular political system protecting against rights violations that the rights concerned had somehow disappeared. Coercion cannot be used, except by a great stretch of the meaning of the word 'protect', to protect the right not to be tortured

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<sup>49</sup> See how Hart's interpretation of legal and moral rights, and his insistence on an effective disjunction between the two kinds of right, applies in real cases. He rejects the use of legal 'rights' for 'a class of helots whom free citizens were allowed to treat as they wished...[in regard of] those acts which they were not forbidden by law to do.' In such a case one might most naturally feel drawn to emphasising the helots' moral rights. But even if Hart *would* allow that they had moral rights, if asked, he certainly rejects considering these as impacting the helots' legal status. So far as the law is concerned, the helots have only 'naked' rights to which no legal obligation whatever is related. 'Naked' rights, according to Hart, are 'nonentities'. If Hart allowed *moral* rights to play a role in this context, and allowed a fuller impact of 'moral' on legal rights, he could accept the idea of 'naked' rights as well. Naked rights would be rights unsupported by specific legal obligation.

when torture has already occurred, for instance. Here one cannot coerce into respect for legal rights, but only into making certain amends for violating them.<sup>50</sup>

To come back to another example considered in the context of Chinese legal practice, we can make sense of the idea that someone has a right to an apology; at the same time, it is difficult to think of an apology as something anyone could have a legal right to. There is a point, in other words, to the idea of moral rights, which cannot be captured by the justification of legal coercion to enforce rights. Legal rights are one form of rights, specific to law as a peculiar social institution.<sup>51</sup>

This is an important point to make for the situation in China, just because the protection of legal rights is comparatively weak there. From the interpretive and moral perspective proposed here, the availability of legal remedies does not determine what legal rights Chinese people have. The question what legal rights there are is connected to the moral justification of rights, as well as to those rights guarantees available in international treaties such as the – not yet ratified – International Covenant on Civil and Political Rights and the text of the constitution; though of course such guarantees require interpretation in the context of the legal system as a whole.<sup>52</sup> It is wrong to say that ‘people’s legal rights *are* their moral rights’, and there has to be some other, more compelling, relationship between legal and moral rights than mere justification for ‘why there *should be* a legal right.’ If the relationship between legal and moral rights is not

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<sup>50</sup> It constitutes no argument against this, to point out that fear of legal punishment in accordance with a coercive legal *rule* will on the whole deter people from torturing, because ‘on the whole’ and ‘will’ signal merely predictive, non-normative statements. A similar point is made by Hart himself in his distinction between being obliged and being obligated. Although he makes this point, it is Hart’s recognition-based understanding of ‘legal rule’ that appears to give force to his basing the existence of rights on coercive legal rules.

<sup>51</sup> Or: a legal right is ‘legal’ by being connected to the practice of a certain social institution.

<sup>52</sup> This is important to the argument in Chapter Five, which also comments on Article 12 of the ICCPR, and to Chapter Seven, which discusses the status of constitutional rights.

weak in the way suggested by Hart, we are thrown back on the question what moral and legal rights we have after all, and need to consider a new approach for understanding the particular edge of the idea of moral rights.<sup>53</sup> I sketch below what this means for China.

Above the distinction between what one should do and what one had a right to do was introduced, as a distinction important to changing Chinese attitudes.<sup>54</sup> Note that if moral rights only have the shadow-like justificatory force proposed by Hart, then what I should do is indifferent to what moral rights I have, unless the moral right in question has already led to the creation of a legal right. It is still possible to make a linguistic distinction, but the distinction has no action-guiding, practical or 'normative' significance. Oddly, too, I do not seem to have an obligation to respect others' merely moral rights not complemented in this way - except perhaps for an obligation to bring a complementing legal right into being, if I can. Of course, this does not mean that according to Hart, I have no moral obligation to respect other people, or that there are not certain things I must not under any circumstances do to them, whatever the law says! Indeed, one could argue in defence of Hart, to say that someone has *no moral right* to do something is only a particularly emphatic way of saying that they ought not to do it. It may be because of the indifference of the ultimate moral question what one should do, to what moral rights people have, which a positivistic understanding of legal and moral rights suggests, that many people are struck with a seeming indifference of 'indigenous' Chinese political and moral discourse to the idea of

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<sup>53</sup> Simmonds uses this question to characterise the 'interest' theory of rights as opposed to the 'will' theory. Simmonds, *Central Issues in Jurisprudence* (2<sup>nd</sup> edition, London: 2002), at pp. 304 ff.

<sup>54</sup> An interesting discussion of the change of attitude required, itself also reflecting an important attitude, can be found in Wang Xiyong (王溪勇), 'Why not choose court to protect one's rights?

rights. But there is still room for further efforts to capture the point of moral rights in a more satisfactory way:

One way is to argue that to say someone has no right to do something is not just emphatically saying that they ought not to do it.<sup>55</sup> Waldron claims that there are several distinct moral rights protecting a *range of options* of conduct, all of which options one may choose in a specific situation, in the sense that interference, or at least coercive interference, with them would not be justified.<sup>56</sup> Necessarily, he says, this protects in some cases against interference with doing what is wrong.

‘The cutting edge of a rights-claim is the claim that it entails about the wrongness of interfering with the action that the right-bearer has chosen. So what is defended or contested when a general right is in dispute is the claim that choice within a certain range is not to be interfered with. This claim in turn is usually defended on the basis of the importance of the choices in the range in question for the lives of the individuals who are making them.’<sup>57</sup>

He forcefully points out why it is right that one should respect a right to do wrong. But he is not very clear about the way the right to do wrong is limited.

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(*Weiquan weihe bu xuan fayuan?*, 维权为何不选法院?), in *Nanfang Ribao* (南方日报) of 20 July 2004, available at <http://www.nanfangdaily.com.cn/southnews/spqy/200407200003.asp>.

<sup>55</sup> In ‘*Ought, Must* and the aims of morality’, a lecture given at Oxford on 28 October 2002, Bernard Williams identifies proper moral uses of *must* as uses at the end of moral deliberation and differentiates these from the use of ‘ought’ which can apply, for instance, to conflicting moral obligations. Used in the negative this distinction applies too. In the main text I argue that certain apparently true propositions about things one should not do (because others had rights that one not do them) can be rejected at a later stage of deliberation. To such ‘prima facie rights’, then only the expression ‘ought not’ should be applied.

<sup>56</sup> I might also call it an ‘area’ conception but the use of this metaphor is limited. It might confuse especially in regard to the right to do wrong, which Waldron defends. If one has a right to choose among right and wrong actions, ‘right’ and ‘wrong’ or some ‘wrong choices’ must belong to one area. See also the exchange between Waldron and Pildes in ‘Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism’, (1998) *Oxford Journal of Legal Studies* 725) and two contributions to the 2000 issue of the same *Journal*, pp. 302 and 309 ff. (‘Pildes on Dworkin’s Theory of Rights’ and ‘Dworkin’s Two Conceptions of Rights’).

<sup>57</sup> Waldron, Jeremy, ‘The Right to do Wrong’, chapter 3 in Waldron, *Liberal Rights. Collected papers 1981-1991* (Cambridge: 1993), 80-81.

For Waldron, the limits of what wrong things one has a right to do, appear to be set by an historical kind of consensus.<sup>58</sup>

‘...Over the centuries, a certain liberal consensus has evolved: individuals’ political activities, their intimate relations with others, their public expressions of opinions, their choice of associates, their participation in self-governing groups and organizations, particularly political organizations and labor unions, their choice of an occupation – all these have been regarded as particularly important in people’s definitions of themselves.’<sup>59</sup>

But paradoxically, if proceeding from an abstract ‘right to do wrong’ we sought to establish limits of such a right using ‘shared’ ‘traditional’ liberties as Waldron suggests we do, no such limits would appear to exist, where no shared traditions of liberal rights could be identified. There would, indeed, appear to be a ‘right’ to do anything wrong; or we would be reduced to the mere unhelpful formula that ‘we have a moral right to do wrong, up to a point.’ In a place where we could not confidently point to a popular tradition of defending and protecting rights, this would be a problem. We can only avoid the conclusion that what it would be wrong to do and what we have no right to do appear the same,<sup>60</sup> if we are able to

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<sup>58</sup> Dworkin, in his earlier ‘What Rights Do We Have?’, in *Taking Rights Seriously* (London: 1977), 268, also discusses the related projects of preserving a right to do wrong, and determining what distinct liberties we have. Dworkin reminds us of Berlin’s famous argument for an (according to my terminology) abstract understanding of liberty, but argues that in order to maintain this abstract view of political liberty, one would have to ‘water down’ the idea of a right, to the point where the right to liberty would be ‘something hardly worth having at all. Preceding Waldron, Dworkin argues that the political ideal of equality requires an identification of specific liberties against a general background right to equal respect and concern. These distinct liberties according to Waldron’s terminology are ‘specific’ liberties, but ‘general’ in designating, each of them, distinct ‘ranges of options’.

Finnis believes that there are ‘fixed points’ which could be identified as ‘absolute rights’, not culture bound, and mentions among these ‘most obviously, the right not to have one’s life taken directly as a means to any further end; but also the right not to be positively lied to in any situation (e.g. teaching, preaching, research publication, news broadcasting) in which factual communication (as distinct from fiction, jest, or poetry) is reasonably expected; and the related right not to be condemned on knowingly false charges, ...[and] the right to be taken into respectful consideration in any assessment of what the common good requires.’ Finnis, *Natural Law and Natural Rights* (Oxford: 1980), 219 f. Characteristically, Finnis’s is an enumeration of things that others *should not* or *should* do to oneself, rather than of what one has a right to do.

<sup>59</sup> Waldron, *ibid.* 81.

<sup>60</sup> And this was the project we embarked on after the discussion of Hart’s account just above.



point out what we have a right to do, whether or not it is wrong for us to do it. Unless we work out a plausible account of this, the liberal attraction of having rights is considerably reduced; and this can only be worked out by making full use of background justifications for having rights at all. A mere appeal to tradition will not do. Waldron should be read as proposing a structure for rights-centred argument: it begins with pointing to a certain range of options, *and continues* with explaining the importance of its inviolability and inalienability.

This might prompt us to return to Hart's abstract, but also useful – and of course not new - suggestion that moral rights make only sense with the proviso that they are limited by the rights of others - another way of expressing their abstract justification by equality and freedom. Hart, of course, presents it as an hypothetical account.<sup>61</sup> This kind of limitation (which we could call Kantian) does not allow us to define any distinct ranges or areas of choice one has in a given situation; but at least it states that there *are* certain limits and gives us an idea of how to determine them. However widely rights may be interpreted, in order for there to be a right at all, that right must be limited by others' rights. The freedom to murder, for instance, is not – as we might put it - normatively valuable 'freedom'. These considerations, Hart's Kantian one and Waldron's and Dworkin's one, are not entirely irreconcilable. They both assert that there is only so far individual people can be persuaded to do the right thing, because they are free. Coercing people is *prima facie* wrong. These propositions are also reconcilable with the principles of the Chinese practices considered above, since the importance of doing right, of persuading, of avoiding coercion if possible do not contradict any of them. Therefore on a 'strong' interpretation of moral

rights, one that does not view them as mere shadows of legal rights, it is easy to make this connection, whereas the positivistic understanding considered earlier on suggested that legal rights had no interpretive connection with common and characteristic responses to wrongs and injustice in China. Chinese responses to injustice are compatible with – they are not inconsistent with – ‘rights talk’. Rights as responses to wrongs and injustice – rights against injustice – most importantly impose a structure on answering the question what should be done in cases of dispute, whereby the wishes and views of individuals are respected in a particular way. This gives the voice of the rights-bearer a special significance; it cannot, of course, transform wrong views into right views, but it protects people to make decisions for themselves within certain limits, and to resist the violation of their rights.

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<sup>61</sup> For reasons evident from the previous discussion. He says that if there are any moral rights at all, then this must be their structure or nature.

### Chapter Three    Rights-assertion, dispute resolution and justice

*Rights and liberal values.* The previous chapter argued that there was no inconsistency between a number of responses to injustice described as common in China to date, and asserting legal and moral rights against injustice. Chapter Two also threw doubt on the usefulness of claims to an alleged ‘liberal’ consensus settling what rights people have. It is possible to employ the idea of rights, including moral rights, in a variety of social relationships and structures, and while it is important to identify particular ‘areas’ of life in which people have rights, we also need to provide some argument for why this is important in a particular society or culture.<sup>1</sup> Of course, such argument must try to be persuasive, so it *aims* at consensus or unanimity. Some think that if only rights could be introduced without the added weight of ‘foreign’ beliefs in liberal values, they would be more welcome in China. Around the time at which some of the cases to be addressed in my further account of Chinese legal practices happened, Ames and Hall suggest that

‘Contemporary China remains, even under “communism”, a ritually constituted society, without even a rhetorical appeal to the belief in objective principles often associated with liberal reflections upon the issue of human rights. The very idea of some regimen of human rights possessed prior to their being granted by the particular society to which one belongs, has never been an assumption of Chinese rulers or peoples. But, as we shall see, this does not mean that the Chinese are left without any guarantees of social or political rights. The real irony of the liberal approach to human rights is that even if it were wholly defensible, the

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<sup>1</sup> Human rights treaties, which place states under obligation to protect rights under the rules and principles of international law, are good starting points for an argument about the implications of this obligation. I give an outline for such an argument regarding the right to move freely in Chapter Five. There, I address Article 12 of the ICCPR and say that China has to honour its obligation under this convention, but also argue that there is an independent reason for protecting the right to move freely, as interpretation of China’s own constitution shows.

exclusive rhetoric of its presentation precludes Chinese investment in its ideas and implications.’<sup>2</sup>

This is a stunning assertion: do the authors happen to know that *no one* in China has ever even assumed that rights might be anything but ‘granted’ rights? Of course they do not; hence the confusing reference to aggregate ‘peoples’ and ‘rulers’.<sup>3</sup> The discussion in later chapters throws doubt on such assertions about Chinese beliefs, by providing evidence of Chinese people thinking and talking about and defending rights without, necessarily, abandoning certain beliefs or values they hold as part of their own culture.<sup>4</sup> For the more abstract discussion in this chapter it must be noted, recalling what has been said in the previous chapter, that it is not at all evident that the ideas that people are free, and that they are equals, are alien to specific Chinese beliefs and attitudes about what is just. The importance accorded to being persuasive in remonstrance and mediation, for instance, suggests that freedom of mind is valued. This value accorded to freedom of mind is therefore as much a condition of being persuasive, as it is a fact about the participants in any particular discourse.<sup>5</sup> Even a practice of deference toward another person, to give another example, while it suggests some measure of inequality, does not *entail* morally significant

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<sup>2</sup> Hall, David, and Ames, Roger, ‘A Pragmatist Understanding of Confucian Democracy’, in Bell, Daniel, and Hahn Chaibong, *Confucianism for the Modern World* (Cambridge: 2003), 124, at p. 152 f.

<sup>3</sup> It appears most plausible that it is Ames and Hall themselves who make ‘assumptions’, or claim that certain institutions and types of conduct in China can be best explained as *requiring* certain assumptions and not allowing others, on the part of those (Chinese) upholding these institutions. But this claim has considerably less force than the claim that the people in question do not, in fact, ‘assume’ the truth of liberal principles.

<sup>4</sup> To quote Chad Hansen, ‘The Asian Values Debate and the Moral Synthesis Goals of Comparative Philosophy’, online at <http://www.hku.hk/philodep/ch/aparights.html>: ‘To isolate “Confucianism” as the community and draw them out of the context of their fellow language users is a transparent attempt to evade internally warranted criticism. Needless to say, this is an obvious objection, since the people being jailed in China are Chinese citizens, born, raised and educated in China, not Western Rawls scholars. Clearly Chinese norms of practical reason always have and still do contain powerful grounds for rejecting Confucian authoritarianism.’

inequality, or a morally significant lack of freedom, for it is possible to be deferent of one's own accord, and for good reasons. Just as not insisting on what is due to oneself presupposes, rather than undermines, the idea of *something* being due to oneself, so, too, the idea of having rights is reconcilable with a certain variety of (culturally specific) schemes as to *what* rights one has,<sup>6</sup> and with a variety of methods of dispute resolution. To elaborate on this idea is the aim of the present chapter, which goes beyond showing that there is no inconsistency, and tries to argue that some Chinese ideas and attitudes can help us better to understand what having rights means, by requiring us to connect this idea to controversies about moral values in Western philosophy. So this chapter is the constructive complement to the previous chapter. It argues that rights discourse gives adjudication a structure that specially accommodates public dissensus, and therefore protects the free and equal status of people in dispute. Like any normative practice, including apologies and conciliation, remonstrance and mediation, rights discourse is also premised on there being right answers and meeting the demands of justice as well as possible, and the implications of this, too, are drawn out here.

Doing justice to the victim of injustice requires, surely, taking the victim's own wishes and judgement into account to some degree. At the same time,

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<sup>5</sup> This is a little similar to Habermas's 'Kantian' 'counterfactual' assumption. Habermas, *Faktizität und Geltung* (Frankfurt a.M.: 1992).

<sup>6</sup> See, again, Dworkin's, 'What Rights Do We Have?', in *Taking Rights Seriously* (London: 1977). If contemporary human rights treaties attempt an enumeration of central rights that anyone has, we should, I suggest, see such enumerations as practical postulates for the people on earth here and now, rather than troubling ourselves with the question if people in ancient China or Egypt 'had the same human rights as we have.' The irritation with which we respond to efforts to relate the application of human rights guarantees to our own factual situation is perhaps a residue of the dogmas of empiricism, compelling us to distinguish between what is true as a matter of contingent empirical fact and what is conceptually true. Quine, 'Two Dogmas of Empiricism', (1950) in *From a Logical Point of View* (1964). A conception of truth opposing this rigid distinction might accept, for instance, that if human life's physical conditions were entirely different from what they are, our moral values might be different.

justice requires that like cases must be treated alike.<sup>7</sup> The adjudication process leading up to court judgements about a person's rights capture, so to speak, a particular moment, at which rights have been asserted by bringing specific claims before the court, and therefore the question about what is just has become considerably sharpened, to the question of what follows from certain legal rights for these claims asserted, on a general assumption that the principle of treating like cases alike will hold. The assumption is that a right one has will be protected by the judges' independent and if necessary coercively enforceable judgement.<sup>8</sup> Sometimes, we perceive a mechanical uniformity of different cases and the way they are taken to and handled in court. For instance, in certain personal injury claims cases, it seems possible to – or at least some people try to – put price tags on all kinds of rights violation, so far as monetary compensation is sought in court. On the other hand, sometimes people want solutions which cannot be easily provided by this court practice, and there is the phenomenon of mediation in all its varieties, conciliation and settlement out of court. It is by some regarded as an irritating and disturbing alternative. There appears to many to be a *conflict*

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<sup>7</sup> Treating like cases alike is a controversial requirement of justice. See for instance Wiggins's discussion of claims of need in *Needs, Values, Truth* (Oxford: 1987), pp. 51 ff., regarding the requirement as unclear. Raz's discussion of equality characterises it as scarcely related to a morally significant notion of justice, in chapter nine of *The Authority of Law* (Oxford: 1979) – as a mere requirement that rules and/or principles be applied. Some use the expression 'contextualised justice', reminding us of the well-known cautions against relying on precedent in Imperial Chinese law.

Note also the difference between criminal law and tort law in this context, tracking the dividing line between supposed private and public realms, or types of dispute, in our legal system. I resume discussion of this problem in my discussion of criminal law in chapter 7.

<sup>8</sup> By contrast petitions or complaints made toward a government authority come early to present this sharpened question about what legal rights require. In terms of technical administrative law, the authority appealed to will often have (administrative) discretion to choose among a number of lawful options. On the other hand in the most extreme form of remonstrance, public suicide, it seems too late for the rights of the suicide protester to be practically significant.

between adjudication and what is termed 'alternative' forms of dispute resolution.<sup>9</sup>

Not seeking the resolution of disputes in courts of law adjudicating over rights might obstruct not only the justice of treating like cases alike - how can it be just that, say, one tortfeasor may 'get away with' a mere apology, when another has to pay damages? It might also hinder the development of law as a growing body of rules and principles; rules and principles which are sometimes replaced by new ones. What if, Luban asks rhetorically, *Brown v Board of Education* had settled out of court? Then, it is suggested, no publicly knowable, publicly announced standard to the effect that segregation denied people's equal status would have resulted from the resolution of this dispute.<sup>10</sup> A similar point could be made about many other 'new' rules and principles crystallised from the adjudicative process, both (though to varying extents) in civil and common law jurisdictions.

But then, so what? It is surely very difficult to think of a reason why the parties to the dispute in *Brown* could have been forbidden to settle their dispute by an agreement reached out of court and without a court decision, even though

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<sup>9</sup> Bernard Williams defines as the aim of relativism to explain away a conflict, and says that so far as it is possible to 'find in the two [conflicting] statements a form that makes them straightforwardly compatible' the problem then faced by the 'relational' relativist is to explain why it *looked as if* there had been a conflict. Precisely in those cases where a logical relation dispelling the appearance of conflict can be established, the second task is very difficult. Williams, *Ethics and the Limits of Philosophy* (London: 1985), p. 156. Having argued that the idea of having rights is not inconsistent with any of the practices described above, this second difficulty is my difficulty now. My strategy is to point out that there is conflict not at the abstract level of the question whether one has rights, but at the more concrete level of what rights one has and how rights are protected.

<sup>10</sup> Luban, David, 'Settlements and the Erosion of the Public Realm', (1995) 83 *Georgetown Law Journal* 2619. It is important to take in the significance of the expression 'out of court', as this suggests the presence - the general availability - of courts, whereas in China, courts are not yet real courts, in some places. (If public standards, rules and principles of justice are upheld by public courts, the question prompted by this finding goes, what of places where there simply are no such institutions, and consequently no such standards can be set up?)

we may feel very happy, now, that they did not, and had the matter out in court.<sup>11</sup>

Or was there, after all, some kind of civic duty to come forth and fight in court for equality, against racial segregation? I think that there is no general intuitive response to this question. We can see value in rights assertion as well as in more conciliatory forms of dispute resolution. Still some writers, perhaps most notably Fiss,<sup>12</sup> invoking Western moral philosophy, have argued that there is a general need for ‘public’ adjudication serving as well as elaborating public (universal) values, as an intrinsically superior way of resolving disputes.

The discussion here addresses these controversies by a discussion of an aspect important to different forms of dispute resolution – varying degrees and uses of publicness – and a discussion of the principle of universalisability. Some contemporary philosophers in the so-called ‘analytic’ tradition have connected universalisability to the liberal values of equality and impartiality, as they have also connected publicness to truth. A critical interpretation of the Kantian universalisability urges the conclusion that due to the centrality of *this* test, publicness as a form of dispute resolution has only indirect value. Publicness is not by itself an indispensable property of just dispute resolution outcomes: it has value as a justice-enhancing form (‘form’ as opposed to substance) of dispute resolution, but it has no intrinsic justifying value. This can help us to qualify the characterisation of rights as ‘impersonal’, understand what is morally good in the so-called ‘alternative’ forms of dispute resolution, and provide the elements of an account of justice in private and public settings. It can also help to get a better

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<sup>11</sup> And I think we can imagine the case to have settled on just terms.

<sup>12</sup> Fiss, Owen, ‘Against Settlement’ (1984), chapter nine in Freeman, Michael (ed.), *Alternative Dispute Resolution* (New York: 1995). Luban’s critique, which I discuss below, goes further than Fiss, insofar as it argues for public adjudication at a more abstract, or conceptual level, than Fiss does.



insight into Chinese responses to injustice and forms of dispute resolution, and provide a link to an important thought in Confucian philosophy.

*Universalisability.* Universalisability is related to the principles of treating like cases alike and others as equals, which have just been mentioned. The Kantian principle of universalisability, as a test for whether one's actions are morally right or permissible, has been expressed most famously as the requirement that one should act so as to make the maxim of one's willing compatible with a general – or universal – law, mirrors principles formulated by many others, which use what Bernard Williams has characterised as a 'role reversal test'.<sup>13</sup> The vocabulary Kant employs already moves us close to the domain of law, as does his use of 'the moral law', of course. For Kant, law or objective 'right' (*Recht*) only governs our external actions, and has the added formal property of publicness; but there are strong connections between law and what he calls the moral law (*Sittengesetz, das moralische Gesetz*).

David Wiggins has addressed a seemingly puzzling consequence of the universalisability requirement. He considers whether this requirement means that as a matter of morality, one may have to assert a particular kind of claim against one's inclination or against a moral urge to be generous and forgiving – on pain, as it were, of counteracting a public morality based on rights assertion.<sup>14</sup>

'It appears that when universalized in Kant's fashion, the maxim 'To release my debtor from his debt, as an act of mere generosity' must stand convicted of what Kant calls a 'contradiction in conception'. (Anyone who knows what debt is must know that, if everyone acted on the maxim 'to release a debtor as an act of generosity', then most of the expectations presupposed to lending and borrowing would lapse, and then the practices

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<sup>13</sup> Williams, Bernard, *Ethics and the Limits of Philosophy* (London: 1985), p. 82 ff.

<sup>14</sup> In Wiggins' example the right (claim) is waived.

presupposed to the intention to release one's debtor from his debt as an act of simple generosity would lapse too.) Nobody is normally required to release his debtor, but it is strange to be required not to.

Where the contradiction in conception test seems problematic, we can still subject intentions and their maxims to the test of consistency of willing. But...[i]f rational agency presupposes that nothing empirical should fix the character of what is done, and if this means that what is done must flow from the agent's giving himself as a law (his pre-empirical self's giving himself as a law) what empirically uncontaminated reason proposes, then Kant needs to be able to confirm the Kantian *purity* of the rationality of the agent's will to ensure (say) that he is helped when he needs help...Is there any account that can do this without importing the metaphysical ideas occasionally drawn upon by Kant that commit one to a quite distinct conception of ethics (...)?<sup>15</sup>

Wiggins argues that 'post-Kantian universalizers' mischaracterised, or misunderstood, the nature of the Kantian self when applying this universalisability test.<sup>16</sup> They mistakenly interpret it as an empirically real self exercising, as it were, self-interested judgement, without *yet* also exercising moral judgement. This self has of course actual desires and drives and intentions and so on; it purports to be an 'I' in the real world, not an agent of rationality according to Kant's conception of people – all people – as belonging to both an empirical and a noumenal world. The post-Kantians mistakenly believe that we can use what people – conceived of in this 'empirically contaminated' way – would decide for themselves, as 'input' for the universalisation process. The outcome of such a thought experiment, according to these post-Kantians, must be correct moral judgement, made in the particular form of a somewhat law-like maxim. There is of course notorious disagreement over whether we can usefully abstract from certain given circumstances we are actually in, or stipulate ignorance of them, to improve conditions for making a universalising judgement

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<sup>15</sup> Wiggins, *Needs, Values, Truth* (Oxford: 1987), p. 69.

<sup>16</sup> This is an approximate way of putting it, as Wiggins is critical of the idea of personal identity.

on this kind of account; but the post-Kantians make no effort - do not care to make any effort - to uphold Kant's metaphysical premises.<sup>17</sup>

Wiggins is right in his criticism of many 'post-Kantian universalisers'. For as frequently pointed out, despite our desire to identify some general criterion for moral goodness or rightness applying to whatever we do, there is no way we can work out a helpful process of making choices that would be 'best' for us, without already demanding that we make those choices as moral choices. But then, why universalise at all? Wiggins proposes that there is another and better way of universalising in the sense of 'doing the best for all taken together,' rather than indexing the moral judgment to be made to who oneself is in the first place.<sup>18</sup> For the post-Kantian universalisers (except Wiggins), this will require them to stop 'trying to determine a recognizably moral content for morality by seeing it as the instrument for the harmonization of interests as pre-morally conceived.'<sup>19</sup> 'Doing the best for all taken together' according to Wiggins 'does not define the moral point of view, it presupposes it, and at best makes what it presupposes more explicit.'<sup>20</sup>

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<sup>17</sup> Nagel uses a related sort of test, proposed by Scanlon, for explaining what is wrong here: (using Scanlon's test of reasonable rejection): 'Because the situation involves a conflict of interests, any maxim on which a person proposes to act would, if universalized, conflict with what he would want for himself in at least one of the hypothetical positions he might occupy under it' Nagel, Thomas, *Equality and Partiality* (Oxford: 1992) at pp. 42 f. See also Scanlon, Thomas, *What We Owe To Each Other* (Cambridge, Massachusetts: 1998). Nagel quotes Scanlon's earlier essay 'Contractualism and Utilitarianism' in Sen, Amartya, and Williams, Bernard, *Utilitarianism and Beyond* (Cambridge: 1982).

<sup>18</sup> Wiggins does not use the idea of identity in this context.

<sup>19</sup> *Ibid.* p. 75. In a similar vein (whatever their differences may be further into the argument) Williams explains, critically, that Rawls compared to Kant assumes a 'less radical' ignorance. 'The point is that a self-interested choice in ignorance of one's identity is supposed to model in important respects non-self-interested or moral choice under ordinary conditions of knowledge (...) [But I]f self-interested rational choice is what is at issue it is hard to see how the question of probabilities [of ending up one way or the other in real society] can altogether be avoided, or how, if the probability of ending up as a slave were small enough, it would not be rational for the parties to choose a system involving slavery if it conveyed large enough other benefits.' Williams, *Ethics and the Limits of Philosophy* (London: 1985), pp. 78-9

<sup>20</sup> *Ibid.* p. 78. On this account, of two 'suspensions' Nagel phrases *ibid.* at p. 43, only the first is an actually troubling one: '[T]he sort of question that I have said must be answered in applying the categorical imperative is itself so close to a moral question about the right way to deal with

With what appears to be a similar purpose, Williams reminds us that 'sympathetic identification with others' as one of the elements that gives force to utilitarianism,<sup>21</sup> cannot be understood as a procedure that guarantees correct moral judgement:

'[T]he insightful understanding of others' feelings possessed by the sympathetic person is possessed in much the same form by the sadistic or cruel person (...) [M]oral thinking demands no sense of 'know' except knowledge, and it is a truth, if not a conceptual one, that any knowledge it can use may be turned against it.'<sup>22</sup>

This observation helps to understand in what way empathy is important, and how it connects to the universalisability test. Contrary to Rawls and other post-Kantian 'constructivists', universalisation understood properly does not describe a procedure, required by the criterion of universalisability, the outcome of which is moral judgement. According to Wiggins, one is instead required to consider another's viewpoint, in a process which one can usefully call 'universalisation', in the following way, and which also invokes the value of publicness.

'He [the universaliser] can consult the moral ideas that he has already and that others have, holding tentatively fast to his own but also holding these ideas open to subversion by anything that might affect them when he contemplates other positions, especially positions that are strange to him, and the moral outlooks of those who occupy these other positions. He endorses a judgment as correct only if, even when in the ways described he imagines himself occupying different standpoints and is properly influenced by that, he still endorses the judgment as correct. And if any two universalisers endorse different judgments then they have to hunt down the source of the discrepancy.' (p. 81) ... Universalizers of the new sort do not *make* moral judgements out of desires, or out of the rational will (whether autonomous or heteronomous). Having the candidate judgments already, what they do is subject them to a publicness or objectivity test by which we should regulate *any* would-be objective

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conflicting interests that it invites the suspicion that the whole procedure is empty: that the categorical imperative cannot be the basis of morality because to derive results from it one must rely on the very moral judgements one is trying to derive.'

<sup>21</sup> Besides the idea of role-reversal discussed above.

<sup>22</sup> Williams, *ibid.* (note 13) at p. 91.

judgment about anything at all, e.g. an object of perception. “It seems to me thus and so. I think it is thus and so. But not everyone agrees: and how would it strike me if I looked at the scene from over there, or from underneath?” (p. 81) ... What these precepts point to as the *aspiration* of moral discourse is nothing less than the objectivity and publicness that are proprietary to truth...<sup>23</sup>

If universalisation led to a moral judgement as an outcome from a procedure processing some non-moral input (information, non-moral judgements, desires, interests), one could point at the procedure of universalisation and say, ‘it has to be right, *because* it has been produced in this way.’ Then, indeed, what is morally right could map a kind of crudely understood moral ‘legislation’<sup>24</sup> aimed, exclusively, at distributing rights. And rights might then indeed appear to correspond to ‘interests pre-morally conceived’. The moralising effect of the universalisation technique would be to make such interests compatible, by seeing how much of an individual’s interests remained as worthy of protection, after undergoing the universalisation procedure, which ascertained that one individual’s interests did not detract from or impinge on another individual’s interests. On the basis of an understanding of rights as worked out in the previous chapter, this cannot be correct.

However we understand the role of role-reversal in moral argument, it cannot lead to a complete denial of the freedom of the other person to decide for

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<sup>23</sup> *Ibid.* p. 84. Compare this to Guest’s account of direct equality: ‘If we want to persist with equality as a moral ideal, it means that we should not say that a state of affairs is morally unequal and therefore wrong because it consists of unequal outcomes. Rather, we should understand equality as a relationship between *ourselves* and others. If we have genuinely been treated as an equal then we cannot have a grievance about justice. Directing our understanding this way shows that an appeal to equality is displayed in the common sort of complaint that goes ‘I’m a person, too’, or ‘Try to see it from my point of view’, or ‘Be fair to me.’ Here, treating a person as an equal means ‘acting with the awareness that another is, in the important aspects, equal to yourself.’ Stephen Guest, ‘Why The Law Is Just’, (2000) *Current Legal Problems* 31. Guest apparently agrees that moral equality requires something different from what can be expressed in a logical universalising formula and this too appears to come out in Wiggins’s critique and re-interpretation of universalisation. But there are differences, too. Guest obviously is aiming at a

themselves what their interests are. People have moral obligations but they are not interchangeable moral agents just acting out moral obligations and rights. Only in a (Kantian?) world in which *anything* that is wrong is also an infringement of freedom and in which freedom threatens to verge on the freedom only to do the *right* thing,<sup>25</sup> might this appear to be no problem; but then in a Kantian scheme, the moral law would only be required because humans are not purely rational, and legal rights would have to be understood as flowing from the principle of objective right, which only governs what Kant calls 'external' actions in the empirical world, and therefore not the freedom to think, judge, differently and wrongly.<sup>26</sup> We are not acting on 'interests' conceived without the important moral ingredient of freedom to choose for ourselves. But neither would it be correct to say that the concept of a right is analytically exhausted by the idea of an option to release another from a duty, at one's own discretion.<sup>27</sup> It has been pointed out how this empty and formalistic approach fails to explain the

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judgement *about* equality, and about justice. Wiggins is suggesting a test or 'consciousness requirement' for moral judgement generally.

<sup>24</sup> The word 'legislation' is used by Kant in one of his formulations of the categorical imperative.

<sup>25</sup> Isaiah Berlin's charge against Kant, in 'Two Concepts of Liberty', in *Four Essays on Liberty* (Oxford: 1969).

There is little reason to think that Kant would have agreed with there being a moral right to *do wrong*. Consider his stance on 'a supposed right to lie for benevolent reasons' (which is that there is no such right). But note that while Kant explicitly condemns lying under any circumstances, he might have difficulties with negligently wrong statements, and it seems impossible to understand him as saying that people must not say wrong things at all, even when they are making an honest mistake! One should point out at this stage that being wrong in argument and doing wrong are different things, but error, it appears, may affect both. - Consider, too, Kant's definition of *Recht* (objective right) as the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom. Here, voluntary action or choice (*Willkuer*) is the action or choice of real human beings, which may, of course, be wrong. Seen from that perspective, and considering that Kant *also* asserts that right (*Recht*) 'comes from' justice, there seems to be an argument for people having a range of (in Dworkin's and Waldron's sense) morally meaningful options protected by *Recht*, and rights, on Kantian terms. Kant, *Metaphysics of Morals*, translation here used available at [http://www.4literature.net/Immanuel\\_Kant/Science\\_of\\_Right/2.html](http://www.4literature.net/Immanuel_Kant/Science_of_Right/2.html).

<sup>26</sup> Kant says in his *Metaphysics of Morals* (1785), in the chapter 'Doctrine of Right': 'Now, everything that is wrong is a hindrance of freedom, according to universal laws; and compulsion or constraint of any kind is a hindrance or resistance made to freedom. Consequently, if a certain exercise of freedom is itself a hindrance of the freedom that is according to universal laws, it is wrong; and the compulsion of constraint which is opposed to it is right.'

inalienability of certain rights, or the distinction between rights alienation and rights waiver.<sup>28</sup> We are of course aware, too, that real freedom to think and judge for oneself also requires the freedom to make public use of one's reason – that it requires a right to free speech.<sup>29</sup> In this context, some important freedoms such as the freedom of speech may usefully be related to general human 'interests'.

To choose a rights-centred mode of moral discussion cannot mean that the business of determining morally right actions becomes suddenly *limited* to sorting out what rights each person has and what obligations on the part of others follow from, or correspond to, such rights. This would imply an odd, overly mechanical conception of rights. There is an added, empathetic, other-conscious aspect to them. The discussion above has had the goal of bringing out that this aspect can be understood in terms of the universalisability test.<sup>30</sup> There is no general obligation to exercise one's rights in a particular assertive way, or to assert or enforce claims toward others just because one is morally permitted to assert or morally capable of asserting them. This is as pointless as it would be to characterise a person as just, for instance, just because he had a certain right.<sup>31</sup> Asserting one's rights in court (or any other forum) is not generally more reasonable or more rational, or otherwise superior compared to not asserting

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<sup>27</sup> This is generally thought to be the gist of the 'will' theory of rights.

<sup>28</sup> Compare Simmonds, Nigel, *Central Issues in Jurisprudence* (2<sup>nd</sup> edition, Cambridge: 2002) at pp. 310 ff..

<sup>29</sup> A distinction between public and private use of reason was used by Kant in 'What is Enlightenment?' (Koenigsberg, 1784). In a private relationship as with one's employer, there may be restrictions on what one may say, but not in public. But while the public use of reason should be free, there is no right to disobey a command based on 'public' law, according to Kant (see just below).

<sup>30</sup> To revert to the example, there may be no duty not to enforce a claim, but even so it may be right to do so, and doing so may be a particularly good realisation of moral freedom.

<sup>31</sup> Williams draws our attention to Aristotle's claim that a person who was just 'stood between' a person who suffered injustice, and a person who inflicted injustice. On the face of it, this rightly strikes us as odd. Williams says that the central case of acting justly is making a just distribution. Bernard Williams, 'Justice as a Virtue', in Rorty, Amelie (editor), *Essays on Aristotle's Ethics* (Berkeley: 1980), 189, at p. 191. My argument here concentrates more on reactions to injustice

one's rights in court. But neither can we say on the basis of the above that it *might not* be better to litigate in certain cases, or that one might not have a duty to do so, arising not from the fact of having a right, but from some other circumstance.<sup>32</sup> This confirms that a moral judgement of what rights one has cannot be conclusive of what one should do.

Even though rights are a matter of justice and though justice 'must be done,' it would be as wrong as it would be impossible to compel people to stand up to those who infringed their rights in those situations when it matters, as in *Brown v Board of Education*. With Waldron, we should appreciate the difference between alienating rights and waiving rights, and understand that what a rights-centred conception of justice requires is merely that certain rights must not be alienated, even though they may be waived on occasion.<sup>33</sup> This matters to how we should assess the situation in China, where the disposition of people to assert their legal rights is growing, but slowly. However enthusiastically we may endorse the protection of rights or of certain particularly important rights, we depend to some extent on such factual dispositions for a confident assertion that the protection of rights in a particular place or society is required. Many mixed motivations can deter people from taking the rights they have to court: fear, for instance, or the desire to restore a relationship to genuine reconciliation and peace. Of course, we are allowed to persuade people of the importance of certain rights.

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than on ways of being just. Such reactions can be right or wrong, even when a just *distribution* of rights has been put in place.

<sup>32</sup> Consider in this context the status of rights against the state and in particular, perhaps the right to freedom of mind; a freedom which Kant characterises as also a duty. From his perspective (that is, rejecting that there is a meaningful 'right to do wrong') it seems that rights (just) are coercively protected rights against being wronged by others, but even on this account it seems there could be no obligation to insist on their coercive enforcement to prevent a wrong or provide a remedy when having been wronged.



A cautious and critical understanding of the requirement of universalisability, one that does not seek to understand it as a kind of procedure for harmonising interests but as an injunction to consider the other person, including their moral views, has a further advantage of importance to the present study. It allows one to connect to important Confucian ideas, notably that of ‘alterity’ or ‘reciprocity’ or ‘altruism’<sup>34</sup> or, indeed, ‘the Golden Rule’, *shu*.<sup>35</sup> Both *shu* and *zhong*<sup>36</sup> are aspects of *ren*, human-heartedness, according to Confucian teaching.

‘Zigong asked: “Is there a single word such that one could practice it through all one’s life?” The master said: “Reciprocity perhaps? What you do not want done to yourself, do not do to others.”’<sup>37</sup>

These ideas allow us to re-examine the claim that Chinese culture, in particular Confucianism, does not allow for a sound rights-oriented legal practice, and the

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<sup>33</sup> Waldron, Jeremy, ‘Inalienable Rights’, in (1999) *Boston Review*, April/May issue, available at <http://www.bostonreview.net/BR24.2/waldron.html>.

<sup>34</sup> The translation used by Feng Yu-lan. Angle in his discussion of Liu Shipai’s account of *shu* in the early 20<sup>th</sup> century chooses the translation ‘using-oneself-as-a-measure’, obviously referring to the also widely known saying, *shu, tui ji yi ji ren ye* (恕, 推己以及人也), ‘to be able from one’s own self to draw a parallel for the treatment of others; that is *shu*.’ This is a quotation from the (Neo-) Confucian Zhu Xi. (朱熹, 1130-1200). Angle, *ibid.* p. 169. Wiggins uses the expression ‘alterity’.

<sup>35</sup> One could also relate *shu* (恕) and *ren* (仁) to equality in Guest’s sense, referred to above. To understand what equality requires, one must seek to empathise with the other person, however different that person be from oneself. This means that to view oneself in a certain social role does not detract from the ability to see oneself as essentially *like* the other, or as essentially equal. Similarity is not enough for equality but neither does inequality follow from difference. This is because equality is a substantive, not just a formal idea. To say, for instance, in a contemporary context, that people have equal human rights is to say more than just to say that all people have human rights, according to such a substantive view.

<sup>36</sup> Feng Yu-lan characterises this as ‘the practice of conscientiousness towards others.’ It is often translated as ‘loyalty’.

<sup>37</sup> Analects, XV.24. *Ji suo bu yu, wu shi yu ren* (己所不欲, 勿施于人). Wiggins also mentions *shu* in this context, and uses the translation ‘alterity’ for *shu*. Translations consulted are available at <http://www.wsu.edu:8080/%20~dee/CHPHIL/ANALECTS.HTM>. and Dawson, Raymond, *Confucius. The Analects* (Oxford, New York: 1993). For the original text and an explanation, see for instance the edition in the *Chinese Sages Series* (中国胜任文化丛书), Cai Xiqin, Lai Bo and Xia Yuhe (蔡希勤, 赖波, 夏玉和, translators and annotators), *Confucius. The Analects* (Huayu Jiaoxue Press (华语教学出版社), Beijing: 1994).p. 251 f. This latter text translates ‘forbearance’, probably partly because of the modern usage of the character *shu*.

claim that law in Chinese culture is frequently viewed as something intrinsically bad.<sup>38</sup> Consider, again, the arguments of Ames and Hall.

‘[I]n China, there is less of a tendency to stress the legal enforcement of rights. In fact, reliance upon the application of law, far from being a means of realizing human dignity, has been perceived as fundamentally dehumanizing since it leads to the impoverishment of mutual accommodation and compromises the particular responsibilities of the community to define what would be appropriate conduct.’<sup>39</sup>

They could in this passage be alluding to another one of Confucius’s observations in the *Analects*, which has often been quoted to explain that in Chinese culture law was generally thought of as something bad.

‘Lead the people with governmental measures and regulate them by law and punishment, and they will avoid wrongdoing but will have no sense of honour and shame. Lead them with virtue and regulate them by the rules of propriety, and they will have a sense of shame and, moreover, set themselves right.’<sup>40</sup>

The first thing that should strike us about Ames’s and Hall’s remark, is that unlike law, rights, including legal rights, are not simply ‘applied’ but require to be asserted before they can be defended and protected. The authors’ swift transition from ‘rights’ to ‘law’ is therefore inappropriate. Secondly, as just discussed, the possibility that rights assertion under certain circumstances may be disruptive and wrong is not conclusive of the question if legal rights are generally worth having. It is precisely the idea of rights-centred law as a moral

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<sup>38</sup> Morris’s and Bodde’s *Law in Imperial China* has contributed to spreading this view.

<sup>39</sup> Hall, David, and Ames, Roger, ‘A Pragmatist Understanding of Confucian Democracy’, in Bell, Daniel, and Hahn Chaibong, *Confucianism for the Modern World* (Cambridge: 2003), 124, 152 f.

<sup>40</sup> Confucius, *Analects*, II.3. (*Zi Yue: dao zhi yi zheng, qi zhi yi xing, min mian er wu chi; dao zhi yi de, qi zhi yi li, you chi er ge.* 子曰：道之以政齐之以刑 民免而无耻 道之以德 齐之以礼又耻而格). It is important to notice that the expression here translated as ‘law and punishment’ is represented by the single character *xing* (刑) whose central meaning is legal punishment (as in *xingfa*, penal or criminal law). See the translation (used here) by Liu, Shu-Hsien, in

practice, not an application of imposed rules, that can have a humanising effect on the practice of law.

It has of course been variously argued, and in much greater depth than attempted here, that Confucian values are reconcilable with human rights.<sup>41</sup> In a similar vein, Angle has argued that there is ample opportunity for communication between members of different cultures with concepts of rights that are at a certain conceptual distance, but not, apparently, therefore unable to communicate with each other about rights.<sup>42</sup> In order to make Confucian values work for an actual rights-oriented legal practice in China (and elsewhere) it is also important to see how it may influence, guide and justify such a practice. The reflections above suggest that Confucian values can urge us to give exact and sensitive consideration to the problem of rights assertion and require us, as suggested in my introduction, not to insist inappropriately on what is due to us. They also urge us, perhaps especially in view of the word for 'rights' in Chinese, not to equate the idea of profit or 'interest' with the idea of rights, even though these ideas are related.<sup>43</sup>

It is particularly important in a Chinese context to distinguish between rights and interests, because of the connotations the word for 'right' (as in 'subjective right') in its standard translation has in Chinese. It is useful to remind

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*Understanding Confucian Philosophy* (Westport: 1998), at p. 20, and Cai, Lai and Xia, *ibid.* pp. 12 f..

<sup>41</sup> See for an influential argument of this kind, Du Gangjian, Song Gang, 'Relating Human Rights to Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence', in Davis, Michael C. (editor), *Human Rights and Chinese Values* (Oxford, New York: 1995).

<sup>42</sup> Angle, *ibid.* His explicit conclusion (at pp. 250) is a little difficult to understand because he chooses to refer to the Chinese community, and more specifically to its government as the relevant (why?) participants of a cross-cultural dialogue on rights which he proposes. He says that 'the only way a community can unilaterally declare its values and practices immune to the scrutiny of others is through "parochialism," which also cuts off that community from making legitimate demands on others.' p. 250.

ourselves of the relationship between the notion of *yi*, justice or a sense of justice, and the notion of *li*, profit, which according to Feng Yu-lan's classic exposition of Chinese philosophy expresses an opposition.<sup>44</sup> The word for 'right' in Chinese is *quanli* and contains the character *li*, profit. The word for 'interest' is *liyi* and the standard translation for 'rights and interests' is *quanyi*.<sup>45</sup> Here, rather than at the level of an abstract discussion of whether the concept of rights is at all intelligible to Chinese or to traditional Chinese (as to that, see my discussion above), is where the connection between language and thought should be considered. Yet this use of language could not by itself demonstrate that Chinese people did not or could not understand the 'concept of' rights or, even more facetiously, demonstrate that rights were not good for them. Angle's fascinating account of the history of translations of texts on international law, and the way 'rights' came to be translated in the nineteenth century by using the character for 'power', *quan* and then routinely combining it with the character for 'profit', *li*, emphasises that these terms became charged with 'normative' and 'positive' (attractive, good) meaning, quite distinct from an early pejorative use of *quan-li*, for instance by Xunzi (3<sup>rd</sup> century B.C.).<sup>46</sup> Particularly interestingly, he argues

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<sup>43</sup> The distinction does not hinge on the use of words. It is of course possible to use 'interest' not in the sense of 'interest, pre-morally conceived.'

<sup>44</sup> 'With regard to the virtues of the individual, Confucius emphasized human-heartedness and righteousness, especially the former. Righteousness (*yi*) means the "oughtness" of a situation. It is a categorical imperative. Everyone in society has certain things which he ought to do. If, however, he does them because of other non-moral considerations, then even though he does what he ought to do, his action is no longer a righteous one. To use a word often disparaged by Confucius and later Confucianists, he is then acting for "profit". *Yi* (righteousness) and *li* (profit) are in Confucianism diametrically opposed terms...' Fung (Feng) Yu-lan, ed. by Derk Bodde, *A Short History of Chinese Philosophy* (New York: 1948), p. 42. *Quan* means 'power', 'might'. I think that partly due to Confucian tradition, the idea of rights could be unfavourably associated with seeking profit, 'standing on one's rights' in an immoral manner.

<sup>45</sup> Cp. Du and Song *ibid.* at p. 46.

<sup>46</sup> Of *quan* (权): 'A Chinese reader of the *General Laws* [a translation of Henry Wheaton's *Elements of International Law* undertaken by an American missionary in the 1860ies, and published in 1864 as *General Laws of the Myriad Nations*, *Wanguo Gongfa* (万国公法)] would immediately understand that there was something special about "*quan*". The *quan* of a state or

that by using *quanli* as opposed to words used in Confucian and other traditional writings, which already referred to reason or right, as an abstract principle,<sup>47</sup> the special point was made that this was something new and therefore worth studying. Chinese language is quite capable of providing an adequate word for rights, but that, of course, does not free us from the task of making an argument for rights protection in China.

While this account of universalisability and its connection with rights assertion puts a stop, as it were, on an understanding of rights that will lead to the conclusion that rights are too cold and cruel, too rule-like and insensitive to individuals, to be attractive or even acceptable in Chinese culture, this account may have the worrying consequence of making rights assertion, defence and protection appear a very complicated matter. If I have a right, then surely you cannot complain if I assert it towards you and ask you to respect it, without complicated considerations about personal relationships coming into the problem. The following discussion considers this objection by discussing the supposed 'public' and impersonal qualities of rights, and the moral significance of the public realm.<sup>48</sup>

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individual are not simply the powers it happens to have: the text makes clear that *quan* is a normative notion, dependent on reason, justice, and agreements.'

Of *quanli* (权利): 'In the *General Laws*, the term "*quanli*" undergoes two kinds of transformations. First, it is regularly used in approximately its traditional sense, but with a positive connotation instead of its older negative connotation (...) [Second], "*quanli*" is occasionally used a direct translation for "rights".' Angle, *Human Rights and Chinese Thought* (Cambridge: 2002) at p. 108 and 109 respectively. His further account traces the history of the use of *quanli* e.g. in Japan and then back in China.

<sup>47</sup> *Dao, daoli* (道, 道理). I comment on *li* (理) in Chapter Four. Liu Shu-Hsien in *Understanding Confucian Philosophy* (Westport: 1998) explains at length how *li* (reason) was given a particular status in the Neo-Confucian tradition, which began only in the eleventh century A.D.

<sup>48</sup> Note that there are several words in Chinese which are commonly translated into 'justice'. Besides the already mentioned *gongdao* (公道) there are *zhengyi* (正义) and *gongzheng* (公正). They have one character, pronounced *zheng* (正) – upright, just –, in common. The first character

*'Public' rights and the moral significance of the public realm.* Many accounts of justice, not least *A Theory of Justice* by Rawls, concentrate on justice as a property of social institutions, and relate their account to a public dimension, as Rawls does by speaking of a 'public conception of justice.'<sup>49</sup> The protection of legal rights, in particular, appears to depend to a degree on there being public requirements of protection. Perhaps the so-called public/private divide has appeared particularly important to philosophers of law who want to strengthen the notion of liberal rights and who insist (as Dworkin does most notably in contemporary jurisprudence) on the possibility of objectivity in legal judgment.

The attraction of rights in this context could lie precisely in their impersonality. Waldron has suggested that legal rights assume importance when 'attachment' ceases. This, he argues, is what allows us to be 'proud and independent individuals.' Law and legal rights are characterised as 'impersonal', 'public', 'public and hence (...) visible and reliable', and as 'formal'.<sup>50</sup> On the other, the 'feeling' side of his dichotomy appear words such as 'natural', 'personal', 'intimate', and time-words suggesting that when dealing with affection, one is dealing with empirical, natural phenomena which 'are initiated' or 'cease'; which obtain only as a matter of 'is' but not of 'ought'.

'Having something to fall back on if an attachment fails may be a *condition* of being able to identify intensely with one's attachments, rather than something which derogates from that intensity.'<sup>51</sup>

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in *gongzheng* (公正) means 'public'. The character *gong* (公) has a connotation of fairness or openness also in other combinations (words).

<sup>49</sup> Rawls, *A Theory of Justice* (Cambridge, Massachusetts: 1971), e.g. at p. 4. 'Now let us say that a society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice.' At p. 10 Rawls discusses the way this might conflict with an Aristotelian conception of justice whereby justice can be a property, or virtue, of persons. Hart in *The Concept of Law* also designates justice as the one moral virtue attaching exclusively to social institutions.

<sup>50</sup> *Ibid.* p. 378.

<sup>51</sup> Waldron, *Liberal Rights. Collected papers 1981-1991* (Cambridge: 1991), at p. 391.

'Is it to be supposed that the intimate and affective relations that characterize various forms of community will never come apart, that affections will never change, and that people will never feel the urge to exit from some relationships and initiate others?'<sup>52</sup>

Yet 'affection' has a normative dimension of its own. It appears that Waldron fails to consider, at least in these passages, how far it is possible to dissociate the psychological-empirical aspect of a relationship between people from what they owe to each other morally or legally. Not only marriages, to use Waldron's most striking example, seem to have their basis in respect - but divorces as well. At least it is difficult to understand how what we owe each other, in marriage as well as in (or after) separation and divorce, should be determined without some empathy blurring the idea of an impersonal other.<sup>53</sup>

Perhaps, though, the role of judges deciding about rights could be used to justify the characterisation of legal rights as 'impersonal'. Practical disputes about legal rights typically involve the judgement of third persons who are not the parties involved. These external parties do not necessarily feel the emotions of the divorcing couple, say, or the loneliness of another's ageing parent. This, it might appear, is actually what enables them to be good judges. But however great their emotional or social distance from the parties,<sup>54</sup> third persons can enter (and sometimes cannot help entering) into the conflicting parties' feelings by

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<sup>52</sup> *Ibid.* p. 374. The expression 'feel the urge' really suggests that such urges can be resisted, and I do not think Waldron was not aware of this when writing; but he does not make more of it.

<sup>53</sup> As to this expression, what, anyway, is supposed to remain of the image of the other when one takes an 'impersonal' viewpoint? It is not clear how 'natural' mutual concern and respect could be replaced by formal claims based on 'formal' or 'impersonal' law. And how can 'concern and respect' at all be understood morally, if they were defeated whenever inclination, feeling, or affection cease to support them? - Perhaps the idea of the impersonal is most persuasive in those cases where there is comparative ignorance of the other person, as in some commercial relationships.

<sup>54</sup> Bearing in mind that the role of the judge, or other third person intervener, changed for instance in English legal history from a person well familiar with the parties to one who should have no connections with them, if possible. Menkel-Meadow, 'Is the Adversary Model Really

empathetic understanding. In their turn, people in disagreement and conflict can sometimes be persuaded by third persons to do right by each other; for instance, to provide adequate maintenance in the event of divorce. They might be helped along by such persons to understand what they ought to do vis-à-vis each other; they may themselves achieve an impartial – though hardly an ‘impersonal’ – viewpoint: they are not barred, just by being emotionally involved, from making right judgements. Conversely the mere fact that one uses, or falls back on, the judgement of third persons to regulate the relationships between ourselves and others, is not an argument that judges need not or must not have affections; or not care for those whom they judge. Waldron’s account of liberal rights is an incomplete account of the moral relationships between persons. Characterising rights as themselves ‘public’ and explaining the private realm as empty of moral obligation mischaracterises what is valuable about public decision processes, and carries the implications of the distinction between public and private too far. Rights have public and private aspects. Even the decision how, or when, to exercise rights must be a private decision.

The same, then, must be said of justice: it also has public and private aspects; there are certain requirements for just conduct towards others, which cannot be settled by settling rights and obligations *understood as proceduralised guarantees* that remaining ‘within’ one’s rights one can do no wrong to another person.<sup>55</sup> As scholars of Aristotle remind us, justice may be understood as a

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Dead? Dilemmas of Ethics [and] Professional Responsibility as Legal Institutions and Roles Evolve’, *Current Legal Problems* lecture delivered on 13 May 2004 at UCL.

<sup>55</sup> Nagel remarks that ‘one of the virtues of a system of exclusive rights is that it permits some of the relations between persons to be governed by pure procedural justice.’ *Ibid.* at p. 140. It is not quite clear to me how he distinguishes those relations from others. At any rate Nagel regards the design bringing about such a scheme as requiring that ‘the actual rights be designed so that their consequences will be morally acceptable.’ It does not follow from this that they cannot be more than morally acceptable; nor that morally desirable conduct could be enforced.



personal virtue (as Aristotle does in the *Nicomachean Ethics*),<sup>56</sup> and in this understanding the person who is just – who knows how to be just – also knows how to be a good friend. It is important to keep this in mind for an understanding of justice that includes rights as a central idea, but does not reject the idea of reconciliation.

It seems that the importance of court practice and the way it is connected with public life, and is itself a public practice, has led some writers to hold a very strong view of an intrinsic superiority of public adjudication over other forms of dispute resolution. Luban, for instance, has argued that adjudication is essentially an ‘elaboration of [certain] public values,’ an indispensable task, we are led to think, which must be (largely) performed by courts of law. In a particular strong and influential form,<sup>57</sup> his view can be traced to a Kantian thesis, that publicness is in some necessary as well as formal way connected to the idea of just law or ‘objective’ right (*Recht*). Consider a statement by Kant also cited by Luban (I choose a standard rather than his modified translation),<sup>58</sup> in the second appendix to Kant’s essay on *Perpetual Peace*.

‘If, in considering public right as the jurists usually conceive of it, I abstract from all its *material* aspects (as determined by the various empirically given relationships of men within a state, or of states with one another), I am left with the *formal attribute of publicness*. For every claim upon right potentially possesses this attribute, and without it, there can be no justice (which can only be conceived as *publicly knowable*) and therefore no right, since right can only come from justice (...) [W]e may specify the following proposition as the *transcendental formula* of public

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<sup>56</sup> Aristotle, *Nicomachean Ethics*, fifth book. Also Wiggins, David, ‘A Neo-Aristotelian Approach to Justice: How Would It Go?’, public lecture given at Cambridge on 11 July 2002. Wiggins’s ‘Neo-Aristotelian Reflections on Justice’ in 113 (2004) *Mind* 477 are partly based on this lecture.

<sup>57</sup> Luban also looks to Hegel, the Hebrew Bible, Fiss, Hannah Arendt, Dworkin, Finnis, the German criminal procedure, Kant, and some other authors and practices for support of his view about the importance of ‘the public realm’

<sup>58</sup> In the immediate context of his argument about (against) ‘secrecy’ in settlements.

right: 'All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public.'<sup>59</sup>

Writers who see themselves in a Kantian tradition but reject Kant's transcendental form of argument, turn to real public life, 'really' public adjudication in courts, etc., as opposed to *compatibility* with being made public.<sup>60</sup>

But as an attribute of real-life empirical events 'publicness' can have, as we know, a multitude of functions, without having the important normative connotation Kant meant by 'compatibility with being made public.' Attributing a particular moral significance or status to publicness just by itself presents us with a danger quite similar to the danger already addressed by Williams in regard to empathy: there is of course no guarantee of rightness coming from the public form of a judgement made or a decision or action taken. Just as the cruel person can use empathy, so can the tyrant use law. Exaggerated expectations from publicness in this respect seem often linked with a notion of authority, as in 'authority of the law', or 'authority of the state'. Indeed, Kant when addressing the consequences of his 'compatibility with being made public' criterion for the concept of objective right, saw himself forced to say that no person had a right to resist against a tyrant ruler as long as he ruled through public 'Right'.<sup>61</sup> In

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<sup>59</sup> 'Alle, auf das Recht anderer Menschen bezogene Handlungen, deren Maxime sich nicht mit dem Prinzip der Publizität verträgt, sind unrecht.' By contrast Luban translates 'incompatible with publicness,' *ibid* at p. 2648. Quoted from Reiss, *Kant. Political Writings* (2<sup>nd</sup> edition, Cambridge: 1991), p. 136 and p. 125. In the *Metaphysics of Morals* he says at paragraph 43: 'Public right is the sum total of those laws which require to be made universally public in order to produce a state of right.'

<sup>60</sup> Very prominent among these is Habermas, to whom Luban also refers at p. 2658.

<sup>61</sup> So contrary to my translation above it appears that *Recht*, despite being dependent on a formal moral criterion, is not always 'just law', but can also comprise the unjust laws of a tyrant. 'The rights of the people have been violated, and there can be no doubt that the tyrant would not be receiving unjust treatment if he were dethroned. Nevertheless, it is in the highest degree wrong if the subjects pursue their rights in this way (...) According to this principle [of publicness] the people [oppressed by a tyrant] asks itself whether it dares to make public the maxim of its intention to rebel on certain occasions. It is easily seen that if one were to make it a condition of founding a political constitution that force might in certain eventualities be used against the head of state, the people would have to claim rightful authority over its ruler. But if this were so, the

contrast to this I would suggest that under an extreme tyranny the fact that institutions of the tyrannical state, including courts, are 'public' institutions, does not help to justify them, or to deny citizens the moral right to resist. Interestingly, this attitude could be supported by reference to certain ideas in Confucianism, expounded, among others, by Du and Song (above).<sup>62</sup> Endorsing such a right against the standards and boundaries set by publicly announced laws requires us not unthinkingly to attach value to the supposed formal attribute of publicness as an attribute of law. It helps to demystify law by making use of an idea of justice giving a right to break law, in certain cases.

We must conclude from this that publicness as a form of dispute resolution can only have indirect value. Perhaps 'compatibility with being made public' can be understood as an attitude to be taken by the person who has made judgements already, and tests these judgements against the standard of compatibility with being made public, in a way quite similar to 'universalisability'. Certainly, one of the values of having public adjudication consists in having an opportunity to treat like cases alike; another consists in having a forum for robust public argument and disagreement. Treating like cases alike also means protecting legitimate expectations, giving fair warning to people as to how the law might treat them. This is a practical argument about the moral equality of citizens. (It is one which, as was pointed out earlier on, is distrusted by Chinese practices.) In this interpretation, publicness has only instrumental value, just as the publicness of

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ruler would not be the head of state; or if both parties were given authority as a prior condition of establishing the state, the existence of the state itself, which it was the people's intention to establish, would become impossible. The injustice of rebellion is thus apparent from the fact that if the maxim upon which it would act *were publicly acknowledged*, it would defeat its own purpose.' *Ibid.* at p. 126/7.

<sup>62</sup> 'The path of justice discussed in the *Analects* introduced the classical notion of resistance. In the *Analects*, 'justice' (*yi*) is not less important than 'benevolence' (*ren*). Both justice and benevolence have higher authority than the written law.' *Ibid.* at p. 45. Many writers in the

remonstration or demonstration: it is not the fact that someone chooses a public forum to protest that makes his case, but the substantive grievances or arguments he takes into that public forum.

Moreover treating like cases alike can be understood as a requirement flowing from the principle of moral equality. So, too, can the ‘universalisability’ requirement discussed above, or the Confucian principle of *shu*, reciprocity. Connecting my interpretation of the value of publicness to the previous discussion of universalisability I suggest, therefore, that publicness is not ensured by, and that justice is not simply - not always - achieved by, looking up publicly available precedent cases enabling one to treat ‘like cases alike’.<sup>63</sup> What is most important to the universalisability test as interpreted above, is not to make a process of dispute resolution known to the public, or referring to publicly or generally known standards. Rather, publicness warrants the conditions in which one can attain the perspective of the other person. As sociologists have many times pointed out to us, this can be much helped by the presence of a third person, of interested and active spectators, mediators, or judges. A study of various dispute resolution techniques therefore also teaches us important lessons about different ways to use publicness: publicness begins, one could say, with the presence of a third uninvolved person.<sup>64</sup> In such a ‘public’ sphere rights may but need not always be asserted.

A related and just as important instrumental value attaching to the institution of public rights protection is its liberating effect on public discussion.

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American liberal tradition, notably including Thoreau, Rawls, and Dworkin, have argued for a right to resistance – a right, indeed, under certain circumstances to break the law.

<sup>63</sup> To discern the rule or principle contained in precedent cases is an instantiation of rule-following not easily explained, as Wittgenstein reminds us. Guest, ‘Why The Law Is Just’.

<sup>64</sup> There is a Chinese saying, ‘two people make for a private, three people make for a public setting’ (*liang ren wei si, san ren wei gong*, 二人为私, 三人为公).

As is argued in the following, it is important to be able to voice disagreement, also about the most consequential moral and legal questions in a society, and the institution of public rights protection in conjunction with certain substantive legal rights make these processes possible in liberal and democratic societies. In this sense, publicness has value not so much as an attribute of law as it has value as an attribute of a certain, important form of disagreement (about what is right).

The thesis that emerges from this is that the very interpretation of universalisability and equality which gives edge to the idea of rights is also an interpretation that allows us to see value in consensus and persuasion to do the right thing. It stresses the importance of rights' origin in a moral perspective (one *may* forgive one's debtor, out of mere benevolence), and the right, therefore, to break the law that gives and constrains legal rights, in extreme cases. Translated into the logic of rights this means that conciliation should be valued and sought, and that it may be right, for this purpose, not to insist on what is due to oneself. But it may not be; rights assertion is situation-bound. Translated into traditional Confucian terms it confirms the insight that 'a noble person will achieve conciliation based on principle but not blind union. A small person will blindly seek to unite, but cannot achieve principled conciliation.'<sup>65</sup>

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<sup>65</sup> *Junzi he er bu tong, xiao ren tong er bu he* (君子和而不同，小人同而不和). Confucius, *Analects* XIII.23. Cai, Lai and Xia's edition (above note 37), at p. 207. Dawson, *ibid.* (note 37) at p. 52, translates for 'unite' 'making one's views coincide with those of others' and juxtaposes this with 'behaving in a conciliatory manner.'

## Chapter Four      Chinese mediation practice

*Mediation and judgement.* Chinese mediation or *tiaojie*,<sup>1</sup> this chapter argues, is firmly premised on the participants' making judgements about right and wrong. The moral status of influence exercised persuasively or coercively in Chinese mediation depends partly on the rightness of the judgements on which it is based. It also depends on the availability of other dispute resolution procedures as alternatives to mediation. Overall it is suggested here that the function of mediation changes with the introduction and evolution of rights-centred court practice in China.

Chinese mediation combines persuasion and education with what could usefully be called a principle of indirection, or depending on the case, redirection on the part of the mediator, and aims at public recognition of the mediated solution by all involved parties. Often the success of mediation depends on the ability of the mediator to win personal deference from the parties to a dispute and this in turn often relies on the mediator's potentially coercive power. Viewed together, these features make Chinese mediation quite distinct from adjudication about legal rights; yet it does allow for disputes to be resolved justly. But this is an abstract account, and we must allow it to be challenged by the reality of actual mediation processes, a few examples of which are considered in this chapter.

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<sup>1</sup> Similar to Michael Palmer in 'The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation', in Butler, W.E. (ed.), *Yearbook on Socialist Legal Systems* (New York: 1987), and to Donald Clarke in 'Dispute Resolution in China', (1991) *Journal of Chinese Law* [succeeded by *Columbia Journal of Asian Law*], vol. 5, no. 2 245, I think we must be careful to remind ourselves that mediation in the Chinese context is quite different from mediation in Western societies. This is not to say that arguments used in debates about the latter could not be used for discussing the former.

‘What is called mediation<sup>2</sup> is when, as a conflict between two parties arises, a third party takes it on itself to handle it and in accordance with certain prescribed rules, uses the techniques of persuasion, education, and reformation<sup>3</sup> to carry out resolution and restore harmony, thereby effecting that the parties to the dispute reach “deep insight and great understanding;”<sup>4</sup> that they “understand and accommodate each other”<sup>5</sup>, and negotiate a resolution of the conflict, to “let the matter rest so that people be set at peace”<sup>6</sup> and that they get along amicably, for the aims of social stability and harmony.’<sup>7</sup>

Mediation, in institutionalised form, has been a traditional response to disputes in China for many thousands of years.<sup>8</sup> It was also used in communist China and is still widely practised to date. Mediation is used as a technique by courts in the course of certain types of procedure, especially civil litigation. The Code of Civil Procedure provides in its article 86 that ‘where a civil case which it has accepted can be mediated, the people’s court shall resolve it through mediation on the basis of the litigants’ voluntary participation, by ascertaining the facts and by distinguishing right from wrong.’ The content of the agreement reached through mediation ‘shall not contravene the law.’<sup>9</sup> Judicial mediation can also be used for ‘minor’ criminal cases, notably such cases as can be privately prosecuted.<sup>10</sup> In

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<sup>2</sup> The Chinese term *tiaojie* (调解) can also be translated as ‘conciliation’ (see Palmer, *ibid.* p. 219). Note that in the late eighties the term *tiaohe* (调和), ‘mediation’, was officially brandished as standing for an illegitimate kind of mediation, seeking compromise at all costs and neglecting the rights and wrongs of a case. Palmer, *ibid.* The term *hejie* (和解) is now generally used for settlement that does not result from proceduralised mediation.

<sup>3</sup> *Ganhua* (感化), literally, reforming or transforming emotions. The translation offered in *The Concise English-Chinese Chinese-English Dictionary* (Oxford/Beijing: 1986), at: p. 141 is ‘[to] reform a misguided person through persuasion.’

<sup>4</sup> *Shen ming da yi* (沈明大意). I put this and following set four-character expressions in citation marks to indicate the feel they have of being quotations, in Chinese.

<sup>5</sup> *Huliang hurang* (互谅互让).

<sup>6</sup> *Xi shi ning ren* (息事宁人).

<sup>7</sup> Li Chunlin (李春林), *Handbook on People’s mediation* (*Renmin tiaojie shouce*, 人民调解手册, Beijing: 1989), at p. 3 on the question ‘What is the basic meaning of mediation?’

<sup>8</sup> Cohen, Jerome Alan, ‘Chinese Mediation on the Eve of Modernization’, (1966) 54 *California Law Review* 1201.

<sup>9</sup> Article 88 of the *Civil Procedure Law* (*Minshi susong fa*, 民事诉讼法). The Supreme People’s Court’s new rules, discussed below, say that the mandatory rules of the law must not be contravened.

<sup>10</sup> Compare Article 13 of the *Criminal Procedure Law* of the People’s Republic of China (amended 1996), also Article 127 (listing offences for which the institution of criminal

divorce cases, the court *must* attempt mediation before a divorce can be granted.<sup>11</sup> Further rules on judicial mediation are discussed below.

Mediation is also institutionalised extra-judicially, mainly in the form of 'People's Mediation'.<sup>12</sup> People's Mediation is dealt with by People's Mediation Committees, which are regulated by the *Regulations for the Organisation of People's Mediation Committees*. Other institutions also provide mediation services;<sup>13</sup> one particularly important one is mediation carried out by the labour tribunals dealing with most labour related 'arbitrations' in big cities. The Chinese constitution provides that the People's Mediation Committees are 'working committees under organisations for grass-root autonomy, such as residents' committees and villagers' committees, whose task it is to mediate civil disputes'.<sup>14</sup> They are supposed to be guided or 'directed' by the courts.<sup>15</sup> They are supposed to be freely elected.<sup>16</sup> In recent years, the urban *shequ*, residential community, has also provided People's Mediation services. The composition of

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proceedings can be made dependent on private action being taken, such as defamation or bigamy. For a detailed account of the introduction of extrajudicial pre-trial mediation in criminal matters, particularly relating to the experiences of one district court, see Mao Guofang 毛国芳, 'On introducing [extrajudicial] pre-trial mediation in criminal matters that can be privately prosecuted (*xingshizisu anjian shezhi qianzhi tiaojie chengxu de gouxiang*, 刑事自诉案件设置前置调解程序的构想)', 2 September 2002, posted at <http://www.shezfz.com/Discuss/detail.asp?id=134>. See also Yang Rongxin (杨荣新), 'Widening the scope of mediation, determining the legal effects of mediation settlements (*Tuokuan renmin tiaojie fanwei queding tiaojie xieyi xiaoli*, 拓宽人民调解范围 确定调解协议效力)', 30 September 2002 at <http://www.rmfb.com/public/detail.php?id=42292>.

<sup>11</sup> Compare Article 35 of the *Marriage Law* (*Hunyun fa*, 婚姻法, as revised in 2001). The new draft *Supreme People's Court Regulations on judicial mediation* contains further rules on divorce cases, requiring the parties to provide written reasons for not appearing for a mediation session (Article 21).

<sup>12</sup> *Renmin tiaojie* (人民调解). Palmer observes that 'although the term *renmin tiaojie* is primarily used to refer to extrajudicial mediation, some legal theorists also employ it to characterize both judicial and extrajudicial domestic mediation,' with further references, *ibid.* p. 220 note 5.

<sup>13</sup> See Gerke's detailed account in *Die Schlichtung im chinesischen Recht (Mediation in Chinese Law*, Hamburg: 1992), at pp. 40 ff.

<sup>14</sup> Article 111 of the Constitution of the People's Republic of China.

<sup>15</sup> Cp. Article 22 (2) of the Organic Law of the People's Courts of the People's Republic of China.

<sup>16</sup> But such elections are often flawed, implying no real choice. The developments in Chinese village election have generated a literature by itself, in recent years. See for instance, the contribution by Horsley, Jamie P., 'A Legal Perspective on the Development of Electoral



mediation committees is changing as efforts are being made to improve the standards of training and education of mediators, and to 'professionalise' their work, and as it is perceived that the changes in Chinese society – economic instabilities and an apparent increase in crime, to mention a few – present new challenges. There are no rules preventing people familiar with the disputing parties from being mediators; on the contrary, local people knowing as much as possible about their community are clearly preferred.<sup>17</sup>

Besides People's Mediation, there are further institutions also carrying out extra-judicial mediation, for instance, the 'judicial assistants'<sup>18</sup> working in local government. Lawyers, too, can be mediators,<sup>19</sup> and governmental departments are responsible for mediation in specific administrative disputes. There is also so-called 'mediation *among* the people',<sup>20</sup> that is, mediation that occurs without any participation by government officials.<sup>21</sup> In the following, I first concentrate on People's Mediation', before making some remarks on mediation by courts.

*The requirements of law, feeling and reason in extrajudicial mediation.* The interpretation of the universalisability test in the previous chapter allowed us to add new substance to the idea of equality in law. Treating like cases alike is important, but the process of identifying significant similarities and determining 'like' legal consequences is, as we know, very difficult, and merely *looking at*

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Democracy in China: The Case of Village Elections,' in *Understanding China's Legal System* (New York: 2003).

<sup>17</sup> Familiarity with the parties used to be seen as desirable in many types of court in earlier Western legal history. Menkel-Meadow, 'Is the Adversary Model Really Dead? Dilemmas of Ethics [and] Professional Responsibility as Legal Institutions and Roles Evolve', *Current Legal Problems* lecture delivered on 13 May 2004 at UCL (forthcoming in *Current Legal Problems*).

<sup>18</sup> *Sifa zhuli yuan* (司法助理员).

<sup>19</sup> Cp. Article 2 of the *Lawyers' Law* of the People's Republic of China and Gerke, *ibid.* pp. 45 ff.

<sup>20</sup> *Minjian tiaojie* (民间调解).

the text of rules, or of precedent cases, is never enough. Morally and legally relevant equality comprises but is not exhausted by the principle of treating like cases alike, although clearly this principle must generally not be counteracted in law. An important exception is when a court finds that previous court decisions have applied the law in a grossly unjust way. Legal rights, when discussed in dispute resolution processes, have the effect of drawing special attention to the positions of 'the other' impersonated by the parties to a dispute (as is strikingly the case in criminal litigation, regarding the defendant's rights).

Mediation, as becomes clearer in the following, is well suited to taking disputants' entire circumstances, including their character, emotions, relationships, changing wishes, and rightful claims, into account, thus including some features which adjudication cannot – and ought not to – consider. This can be a particularly good way of treating people as equals – of, indeed, doing justice to people –, although it makes it more difficult to follow the more specific (equality-dependent) legal principle of treating 'like cases alike', for the obvious reason that the more aspects of a case one allows to be relevant to how it should be handled, the fewer cases one will find that are significantly like each other. The institution of legal rights disciplines and concentrates reasoning at an early stage of the dispute resolution (adjudication) process, on what has been claimed 'by right'. A substantive, non-formal understanding of equality may appreciate mediation and adjudication as different ways of serving the ideal of equality. On an understanding of following legal rules which refutes the simplistic assumption that this could be done by ticking off, as it were, criteria of application in any one

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<sup>21</sup> For instance in Li Chunlin, *Handbook on People's mediation (Renmin tiaojie shouce, 人民调解手册*, Beijing: 1989), at p. 7.

case, to see if the rule did apply,<sup>22</sup> we may not even be able entirely to distinguish legal rule-following from principled appreciation of a party's entire circumstances in the process of mediation.

The *Regulations for the Organisation of Mediation Committees* most importantly require that mediation should be carried out on the basis of the facts (*shishi* 事实) and of an analysis of 'right' and 'wrong' (*shifei* 是非).<sup>23</sup> 'In cases which the law does not provide clear rules for,' the *Statutes* require that they be handled 'on the basis of the public morality of the society.' These, it has been persuasively argued, include 'the content of the feelings and reason[ing] on which mediation practice is based.' In an influential article,<sup>24</sup> two Chinese authors have tried to distinguish between different 'styles' of mediation according to the degree to which law and legal rights play a role in the mediation process. The character for *qing* (情), which was translated as 'feeling',<sup>25</sup> actually has a wide meaning. In certain combinations it translates as 'situation' or 'circumstances'.<sup>26</sup> If, in the present context, *qing* refers to both the 'feeling' and

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<sup>22</sup> For a critique of this approach see Dworkin, 'The Model of Rules I' and 'II', chapters 3 and 4 in his *Taking Rights Seriously* (Harvard: 1977).

<sup>23</sup> Article 8. *Shifei* (是非) has a wide meaning; it is generally correctly translated into 'right and wrong' but also means mere affirmation and negation. Consider also the expression 'seeking truth from facts' (*shishi qiu shi*, 实事求是), a phrase coined by Deng Xiaoping, and quite commonly cited by mediators describing their work method.

<sup>24</sup> Liu Guang'an (刘广安), Li Cunpeng (李存捧), 'People's Mediation and Rights Protection (*Minjian tiaojie yu quanli baohu*, 民间调解与权利保护)', in Xia Yong (夏勇, editor), *Toward an Age of Rights: A Perspective of the Civil Rights Development in China (Zou xiang quanli de shidai: Zhongguo gongmin quanli fazhan yanjiu, 走向权利的时代: 中国公民全力发展研究)*, expanded edition, Beijing: 1995), 285. Lubman, for instance, briefly discusses this essay in his 'Dispute Resolution in China after Deng Xiaoping: "Mao and Mediation" Revisited', 11 *Columbia Journal of Asian Law* 1997, 229 at p. 281.

<sup>25</sup> Note that Lubman translates *qing* (情) in this text (see above) as 'emotions'. I think this has a too passive and perhaps even irrational connotation.

<sup>26</sup> For instance, in the words 'situation' (*qingkuang*, 情况) and 'national condition' (*guoqing*, 国情). In a later paragraph of this essay, the authors mention 'face' [here: *mian* 面] besides 'feelings', and this emphasises interpersonal relations and the feelings that govern these. For an analysis of 'face' see van der Sprenkel, *Legal Institutions in Manchu China. A Sociological Analysis* (London: 1962), p. 99 (also discussing differences between the expressions *lian* (脸) and *mian* (面)).

the ‘circumstance’ senses of the word, and given the juxtaposition with *falü* (law), ‘mediation in accordance with *qing*,’ is mediation in accordance with a reality of feelings and circumstances in a dispute, not all of which might be relevant to its legal assessment.<sup>27</sup> As short translations, evoking the work of Llewellyn,<sup>28</sup> we could use ‘situation sense’, or simply ‘feeling’. *Li* (理) is normally translated as ‘reason’ or ‘principle’.<sup>29</sup> So ‘mediation in accordance with *qing, li*’ (情理) is mediation speaking to reason and feelings, addressing all the relevant circumstances of a dispute in order to resolve it.<sup>30</sup> Mediation in accordance with law, then, must be a process of mediation using a different technique, or taking different aspects into account from those which matter in mediation in accordance with feeling and reason.

The application of the concepts of feeling, reason, and law to categorise mediation goes back to the often used conceptual triad of *qing, li*, and *fa* in Chinese. It is quite common to use the expression ‘*heqing, heli, hefa*’, being ‘in accordance with reason, feeling, and law’ in praise of a person’s, especially an official’s, conduct or decision. In a certain sense, the originality of Li’s and Liu’s approach consisted in breaking up this expression and discussing the possible compliance of mediation with *one* requirement but not the other(s). Another important aspect of the use of these three requirements is that it echoes, without

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<sup>27</sup> By contrast to this use of *qing* 情, whenever in the case reports used by the authors references are made to ‘establishing the facts’ or ‘establishing the historic reality’ in a legal context, different expressions such as *xianshi* 现实 and *shiji* 实际 (‘reality’) are used.

<sup>28</sup> Whose work, in turn, has been brought back to the fore of jurisprudence by William Twining. Compare Michael Freeman’s account of legal realism and of Llewellyn’s idea of ‘situation sense’ in Freeman, Michael, *Introduction to Jurisprudence* (7<sup>th</sup> edition, London: 2001) at pp. 802 ff, especially p. 808.

<sup>29</sup> Compare with this translation: ‘Reason, principle; the fitness of things. Right, as an abstract principle.’ Mathews’ *Chinese-English Dictionary*, revised American edition (Cambridge, Massachusetts: 1943), main entry for character no. 3864.

<sup>30</sup> A standard modern, albeit somewhat dated, dictionary translates the set expression *qingli* 情理 as ‘reason, the whole aspect of a case.’ Mathews’ *Chinese-English Dictionary*, revised American

explicitly mentioning, the more traditional Confucian duality of *li* (礼), 'propriety', and *fa* (法), 'law'. It is important to make quite clear that the Confucian *li* (礼) has linguistically nothing in common with the *li* (理) generally translated as 'reason'; nothing, that is, but its identical pronunciation in Mandarin Chinese. But still, considering the analysis of the Confucian *li* (礼) as 'having emotional content' offered by Bodde and Morris,<sup>31</sup> we must conclude that it has a resemblance with *qing* (情), feeling, and perhaps also with *li* (理), 'reason' or 'right as an abstract principle.' It is worth noticing even at this stage, that the praise of being 'in accordance with feeling, reason, and law' is sometimes also bestowed on legal decisions in contemporary China. As for the Confucian *li* and its juxtaposition with *fa*, law, these terms have resurfaced in jurisprudential debate around the idea of the rule of law. Rule of law was meant to be the form of governance of the new age, of modernity, and was thus considered to be opposed to rule by 'rites', as the Confucian *li* may be most generally translated. Rule by law has also frequently been juxtaposed with 'rule by virtue' or 'morality' and 'rule by men'. Yet in the reality of legal life, both elements appear to remain.<sup>32</sup>

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edition (Cambridge, Massachusetts: 1943), entry for character no. 1170. I think this translation would be too narrow in the present context.

<sup>31</sup> Bodde, Derk and Morris, Clarence, *Law in Imperial China* (Cambridge, Massachusetts: 1967): 'The *li* (...) constitute both the concrete institutions and the accepted modes of behaviour in a civilised state' (*ibid.* p. 19). The authors consider that the *li* were in a sense an 'upper class monopoly', because so complex, they were underpinned by broad moral principles, representing 'what men in general instinctively feel to be right.' 'Li give poetry and beauty to life and have emotional content' (*ibid.* p. 20).

<sup>32</sup> Liu Yan, in 'Rule of Law in China: An Ever-Changing View', a paper presented at the conference *Political Practice in Modern China* in Churchill College, Cambridge, 26-27 June 2002, identifies several stages of juxtaposition in recent Chinese history – 'rule of law vs rule of man'; 'rule of law vs. rule by law'; 'rule of virtue vs. rule of law' -, drawing attention to the reference to rule of virtue (*dezhi*, 德治) made by Jiang Zemin in 2001.

*Extrajudicial mediation achieving justice.* Of the cases of mediation ‘in accordance with feeling and reason,’ one discussed by Li and Liu involves a married couple living in the countryside. Initially, their relations were good, but as the wife bore her husband no child over several years, he started quarrelling with her, and declaring he wanted a divorce.

‘When the chairman of the mediation committee of the village heard about this, he spoke to Mr Ah as follows. “When you come home from work in the fields you are all dirty, but there are clean clothes waiting for you, everything is clean and tidy and supper is waiting for you, is this not all due to the hard work of your wife? She is so good to you, how then can you want to divorce from her?” After this persuasive speech, Mr Ah and his wife restored their good relations. They adopted and reared a child, and their household was a harmonious one.’<sup>33</sup>

This story makes its point by not reporting the actual *qing li*, or the details of the mediation process: it is what can be called indirection or redirection, and consists in shifting the focus away from the conflict.<sup>34</sup> Li and Liu comment:

‘In the above two examples the mediation workers did not consider the loss or gain of rights brought about by the conflict itself; they did not actually get down to the facts and [on that basis] reason with the two parties of the conflict. Nor did they consider whether their mediation should be carried out in accordance with law, or with which law. Rather *they moved away from the conflict itself* and talked about...conjugal love to the parties, thereby getting the parties no longer to calculate their mutual losses or gains of rights, and getting them spontaneously to resolve the conflict and renew harmony, of their own accord.’<sup>35</sup>

It is suggested here that one party’s ‘gain’ of ‘rights’ would mean another party’s loss, although we might point out that no loss or gain could possibly be involved

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<sup>33</sup> *Ibid.* at p. 295. The report is originally taken from the journal (1989) *People’s Mediation* (人民调解) no. 5, 55.

<sup>34</sup> The term ‘to redirect’ is used by Lon Fuller in his ‘Mediation – its Forms and Functions’, (1971) 44 *Southern California Law Review* 305. ‘[T]he central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.’ *Ibid.* at p. 325.

when someone's right was protected against another party who was in the wrong. Li's and Liu's focus is on the experience of the disputants as their dispute develops.<sup>36</sup> Sustained public disagreement about the legal result of a case may be seen as the most striking feature of adjudication over legal rights, and this may be why the authors are so ready to assert that adjudication involved the loss and gain of rights.

In cases in which accordance with law is positively asserted as part of the mediation process, it appears that the mediators will act almost as one would expect judges to act: they establish the facts and suggest a solution as one would expect a court decision to be. But the mediator-judge in such a case will still make a judgement about what should be done, rather than about what people's rights are. Consider the case of the Gong and Liu families living in a village in Shunyi county (in Greater Beijing).

'They lived one in the front and one in the back courtyard. By the eastern wall of the [homes of ] the two families ran a footpath from south to north. In the spring of 1990, Mr Gong blocked up the northern door of his own home and cut two poplar trees by the [eastern] wall. He made a new door going out from the eastern wall, onto the footpath [now] shared with the Liu family. Mr Liu opposed this vehemently. He demanded damages from Mr Gong for the two poplar trees. But Mr Gong not only did not pay any attention Mr Liu's objections. He also climbed onto the roof of the northern room of the Liu family and there demolished over three hundred tiles and stripped off a roof ridge three metres long. Thereafter he dug a fifty centimetres deep ditch in front of the Lius' door.

When the village mediation committee received news of this conflict they first sought to prevent the situation from escalating any further. Secondly, they investigated and established the facts. According to land registration archives, this footpath had been the Lius' footpath of old, and the poplar trees by the wall, too, had been planted by the Liu family.

The mediation committee carried out legal education on Mr Gong on the basis of the residential boundaries established in this way, with regard to the conflict about the trees, the running water, and the footpath. In

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<sup>35</sup> *Ibid.* at p. 295.

<sup>36</sup> By comparison, Vilhelm Aubert, in his 'Competition and dissensus: two types of conflict and of conflict resolution' (1963), in Freeman, Michael (editor) *Alternative Dispute Resolution* (New York: 1995), 151, is very cautious in his references to gain and loss.

doing so they respected the historic reality as well as the principles for carrying out mediation, as they are laid down in the policies and laws of the present. They brought Mr Gong to recognise his mistake. Then they made suggestions for the handling [of the conflict]. They suggested firstly, that Mr Gong undertake to repair the damaged roof of the Lius, and pay damages for the trees, and secondly they suggested that he level out the ditch dug in front of the Lius' door, and resume the use of his original door. Mr Liu accepted this mediation [result] and Mr Gong also complied with it.'<sup>37</sup>

Clearly, the mediation process here has a de-escalating function as the mediators 'sought to prevent the situation from escalating any further.' This preventive function of mediation work is often acknowledged and emphasised by officials, in as impressive ways as possible. There is also what one might call an 'enforcement function' or 'enforcement replacement' function. The mediators 'brought Mr Gong to recognise his mistake.' Persuasion, on this analysis, appears to replace coercive enforcement measures. We must appreciate the fact that the mediator, in this and so many other cases, is a person of power and influence, and that the reason why his 'suggestion' is respected may be the fact that sanction, if indirect ones, are expected in the case of 'disobedience'. It is therefore impossible to decide, on the basis of an account like the one above, if any pressure that may have been brought to bear on Mr Gong was justified. The process could be described as fluid; but this does not detract from the understanding that mediators *should* make right judgements, and be persuasive. High expectations must be held of the process's individual participants and their ability to behave appropriately towards each other.

The 1989 *Regulations for the Organisation of Mediation Committees* provide for the initiation of mediation proceedings either by an application made

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<sup>37</sup> *Ibid.* p. 297-8. The authors note that they have taken this case from 'mediation [case] material of Shunyi county.'



by a party, or upon the initiative of the mediation committee itself.<sup>38</sup> In the latter case, it is assumed that the parties would have agreed to this initiative, and that they want mediation to go ahead. Article 6 (3) requires that the parties' right to sue be respected and that the parties must not be prevented from filing a case with the court on the grounds that they have not attempted mediation, or that the mediation has not been successful. There are no rules directly providing for the situation that a party does not consent to carrying out mediation,<sup>39</sup> and most mediation reports do not address the issue by whom mediation is initiated at all.

Whether a claim to authority to intervene is valid, is all the more important because of the degree of interference that mediation represents. Not only does the mediator in people's mediation have the task of monitoring the mediation result for its lawfulness (Article 6). The local government agency is also called on to 'support the mediation agreement reached under supervision of the People's Mediation Committee, if it is in accordance with the laws and regulations and policies. If the agreement contravenes them, it shall correct it.'<sup>40</sup> Similarly, Article 6 of the Supreme People's Court's *Rules on Handling People's Mediation Agreements* provides that the court may in certain circumstances annul or alter the mediation agreement.<sup>41</sup> There is no hint that the parties to the mediation agreement could refuse to accept the 'corrected' agreement but it is

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<sup>38</sup> *Regulations*, Article 7 clause 1. Gerke translates 'application of the parties' (*der Parteien*), but the Chinese does not specify plural or singular.

<sup>39</sup> Gerke remarks that 'it is an interesting question how often parties are talked into assenting to a mediation procedure by the people's mediation committee. No information could be obtained on this head during the interviews conducted by the author.' *Ibid.* at p. 223.

<sup>40</sup> *Regulations*, Article 10.

<sup>41</sup> See just below on these Rules and Chapter Seven on the status of rules issued by the Supreme People's Court.

stated that the court must not annul an agreement when the party entitled to ask for an alteration has asked for the latter.<sup>42</sup>

The regulations set out that mediation shall be carried out in accordance with the laws, regulations, rules and policies<sup>43</sup> and where none of these are pertinent, on the basis of 'public morality'. It also prohibits seeking illicit personal gain, pressurising, attacking or retaliating blows, humiliating or punishing the parties, betraying their confidences, or accepting invitations to meals or presents.<sup>44</sup>

Importantly, there is an explicit requirement that mediators judge right and wrong. The only justification for influencing the parties can be that it is right so to get them to choose the *right* 'settlement' solution; mediation must be open, then, to leave the parties themselves to find out what the right solution is because that may be crucial. It is also crucial that both parties acknowledge this to be the right solution, because that is what justice – *yi*, the personal 'sense of justice' – requires: it is only achieved, when one is acting rightly on the right motives.

Given the attention paid to questions of right and wrong in both adjudication and mediation the main differences between mediation and rights-centred adjudication, lie in their different approaches to agreement and disagreement, and in apparently different assessments of the moral status of persuasive influence exercised on another.<sup>45</sup> It may not be plausible to assert that

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<sup>42</sup> Supreme People's Court's 2002 *Rules on problems of handling People's Mediation settlement in civil litigation, judicial interpretation* (2002) no. 29 (zuigao renmin fayuan guanyu shenli sheji renmin tiaojie xieyi de minshi anjian de ruogan guiding, fashi (2002) 29 hao, 最高人民法院关于审理涉及人民调解协议的民事案件的若干规定, 法释 (2002) 29 号). There is a strong indication, therefore, that interference on the part of a governmental agency would contravene the principles of mediation so much that it could not be lawful.

<sup>43</sup> *falü* (法律), *fagui* (法规), *guizhang* (规章), *zhengce* (政策).

<sup>44</sup> Articles 6 (1) and 12 of the *Regulations*.

<sup>45</sup> Another case discussed in Li and Liu's Article (see above) is that of a woman persuaded to withdraw the application for a divorce, in circumstances that look very much as though it would have been better for her to insist on divorce, because of a real risk of continued physical abuse.

*genuine* reconciliation could occur unless both parties gained an understanding of the right and wrong of their and the other party's conduct, when examples of actual mediation prove to have worked rather by *diverting attention* from this particular question. But diverting immediate attention from a wrong done, a right violated, a claim that could be made, does not necessarily amount to denying the wrong, the right, or the claim. Understanding and insight, on the other hand, are not always promoted by facing the other person with a statement setting out right and wrong. Indirection, *not* stating one's own view may be the best technique to achieve understanding.<sup>46</sup>

This can be discussed using an example of mediation case narrated in the September 2003 issue of *People's Mediation*, a magazine that contains reports on mediation work and academic activities around mediation, interviews with successful People's Mediators, etc., with an evident purpose of showing the advantages of successful mediation, and giving guidance to mediators.<sup>47</sup> This case in Yulin village in Chongqing involves a father-in-law, old Mr Wu, and daughter-in-law, Liu Xiu, who live in a disharmonious relationship. Their son and husband Wu Jun is generally caught up unhappily in the middle. One day Liu Xiu uses verbally abuses her somewhat deaf father-in-law for complaining that she has not cooked the food soft enough for him to eat. Unexpectedly he hears what she says and a minor fight erupts which leaves both parties suffering light injuries and requiring medical treatment for more than 30 Yuan in each case. They are both certain of being in the right and require to be compensated for the medical bill. An experienced mediator respectfully described as 'old Su'

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<sup>46</sup> This line of argument could be supported by pointing out that sometimes when rights/claims are asserted in court, or redress or retribution sought for a wrong, the claims superficially at issue are not at the bottom of a real dispute.

<sup>47</sup> Liu and Li have also used this journal; see case above.

and 'village cadre Su', nicknamed 'Porridge Su' for his predilection for a local dish, and addressed as 'leader Su', is called in to mediate (*tiaojie*). The two disputing parties, the unhappy and silent Wu Jun, and diverse relatives and other spectators are assembled in a manner, the report says (uncritically), 'really reminding one of the old wartime tribunals.'<sup>48</sup>

Su spends two hours reading out the entire text of the *Law for the protection of the rights of the elderly* and of the *Law for the protection of the rights of women* to everybody.<sup>49</sup> He then asks the parties to 'discuss', which prompts Liu Xiu to exclaim,

"'Leader Su, what is there to discuss? Why can't you just *judge* who is wrong and who is right'<sup>50</sup> - and then of course there is also my medical bill to be taken care of." She shot a glance at the old man.

"'Porridge" Su thought to himself, if I criticise Liu Xiu she's sure to abuse me with her sharp tongue, but if I say the old man is in the wrong I will be hated by *him*...'

He goes on to point out the difficulties faced by both of the parties, the old age of old Wu and the difficult position of Liu Xiu in a family which is not her original (maiden) one, but he is again interrupted, now by old Mr. Wu.

"'Look, Leader Su, I only want you to tell us two things; one is, who was right and who was wrong. The other, you should decide'<sup>51</sup> she's got to pay my medical bill." Su said "But both parties have a medical bill of thirty something yuan; fortunately, that's not all that much. Of course these bills must be paid by the party who is in the wrong. But as to *who* is in

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<sup>48</sup> See Leng's account of dispute resolution in that time, Leng, S. C., 'Pre-1949 Development of the Communist Chinese System of Justice', pp. 1-26 in his *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* (Dobbs Ferry: 1967).

<sup>49</sup> Quite characteristically, it is obvious from the report that family members of both Liu Xiu and her husband are assembled; the publicness of this setting is important to the resolution of the conflict.

<sup>50</sup> She uses the expression *pingpan* (评判) which I translate as 'judge'. The most general translation of *pan* 判 is 'to judge', *ping* is 'to assess', 'to criticise' (评). Adjudication is *shenpan* (审判), 'hearing' or 'trying' and 'judging.'

<sup>51</sup> He uses the word *duan* (断), which more concretely means 'to break' or 'to cut'; the idea is that of discriminating right from wrong, or allotting burdens. *Panduan* (判断) also means 'to judge'.

the wrong, well, I think that both parties should make use of the weapons of criticism and self-criticism. I do not at all mean to say that old Wu is in the wrong. Nor do I mean to say that Liu Xiu is in the wrong; in my view, the fault is with Wu Jun.” Wu Jun and everybody present started. A member of Liu Xiu’s maiden family gave a covert laugh. Su went on: “Aren’t I right? Just look what you’ve done, Wu Jun. Your father is so good and so old; his teeth are loose, why didn’t you explain to your wife she had to use more firewood when cooking. If you had done the cooking yourself, all this wouldn’t have happened. And it’s you who [best] understands your old father’s situation, isn’t it? What’s more Liu Xiu is your wife; and such a good-hearted and honest wife. After this long marriage you understand her disposition; how is it that you cannot make your own father understand your own wife? If for instance she likes speaking out a bit sharply, you ought to explain to your father that this is just going with the times, being modern (...)” “But surely this hasn’t been *entirely* my fault?” Wu Jun asked, confused. “Just think a little,” old “Porridge” Su said softly.’

Su then draws up a simple mediation agreement, the details of which are not given but may be inferred. He reminds the parties that New Year will be celebrated the next day, and that this conflict is after all ‘an internal’ one. Of course, he says, if they cannot make up their minds just yet, he will come back the next day to continue (mediating); but, again, the next day is New Year...

‘Finally, Wu Jun spoke. “I agree with leader Su’s suggestion, and I’ll sign it,” he said. With Wu Jun having taken the initiative, old Wu and Liu Xiu followed suit and signed the agreement...Old “Porridge” Su had again been successful.’<sup>52</sup>

On the surface, it would be easy to characterise this mediation process as one ending in a plainly wrong settlement, in which the eagerness to pacify the conflicting parties had overridden concern for truth and rightness, and perhaps this might lead one further to take this as an example of cultural difference or of

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<sup>52</sup> Pang Ran (庞然) [member of] the [Communist] Party’s Committee of Chongqing Jiangjin City, Dushi Town (重庆江津市杜市镇党委), ““Porridge” Su judges who is in the wrong’ (“*Su Xini*” *duan li*, “苏稀泥” 断理), (2003) *People’s Mediation (Renmin Tiaojie*, 人民调解), September issue, p. 21. Note that the expression *duan li*, ‘judging who is wrong’ or ‘judging right from wrong’ uses the character *li* (理, reason, right as an abstract principle).

a conception of what was right that was 'relative' to culture. But one does not have to look far beneath the surface to see how this process makes sense, also to *us*. Its point here is for Su *not* to judge about the parties' rights and wrongs, and his tongue-in-cheek 'judgement' that the dispute is Wu Jun's fault is shown to be just this, tongue-in-cheek, by the report emphasising that Su does not really want to express a judgement at all. His refusal to judge could be called indirection; his 'judgement' directing attention to Wu Jun could be called redirection: for by doing so, he reminds the parties of the person on whom their affections concentrate, who will suffer if they continue in conflict and who, without being (clearly) at fault is the much likelier real object or cause of the dispute, than the medical bills to be paid. The judgement, ultimately, about who was right or wrong, and how much, must be made by the parties themselves, for their dispute to be truly resolved, and imposing such judgements might only make things worse. The fact that the details of the settlement are not given (it is only said there were four points) further illustrates this. The question who is to pay the bills, of course, has little real meaning in this dispute occurring in the same household of clearly limited means. The real challenge seems to be to get the parties to be just – or to 'do justice' - towards each other, in this case, and the solution proposed by the mediator is an attempt at approximating or promoting this goal. Reverting to the observation that justice pertained exclusively to social institutions, the conclusion seems inevitable that this could not mean that justice was exclusively the business of courts of law.

*Wrong mediation.* Commentators on Chinese mediation are often keen to emphasise that mediation can go wrong, and 'wrongness' in such cases is

generally shown to consist in *both* an unfair judgement of the situation made by the mediator, and undue coercive pressure exercised to make a weak and disadvantaged party 'agree' to the suggested settlement. Often, the mediator denies the wrongful conduct of one of the parties. Li and Liu, in their influential essay categorising mediation, characterise a fifth group of cases,<sup>53</sup> which they simply call 'other cases', as cases in which the mediators have 'neither relied on law, nor on feelings, reason, or custom.' Some of the mediators in these cases, they consider, have been merely

'indifferent, and not wanting to offend any of the parties. Some were in fear of power and just accommodated the bullying party. In some cases the mediator only thought of 'letting the matter rest so that people be set at peace,' but did not consider whether the mediation method was in accordance with feeling, reason, or law.'<sup>54</sup>

Consider the following case, in which the Lu family's daughter has had a pre-marital sexual relationship with the neighbouring Yu family's son Yu Xiaosan. Yu Xiaosan has no intention of marrying this daughter, and the Lu family is outraged. One day

'They all grabbed shovels and hooks and went to see Yu Xiaosan to settle the bill with him. They made a stack of firewood in front of his door, and shouted that they wanted Yu Xiaosan to come out, otherwise they would light the fire and burn his home down. The mediation committee chairman, Qi, on hearing about this hastened to the spot to talk to them. He first addressed old Mr Lu and said, "come, sir, cool down. It's *my* job to beat and punish people."

Then Qi negotiates first with the Lus and then with the Yus, and gets old Mr Yu to slap his son in the face in public, and Yu Xiaosan to apologise to the Lus.

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<sup>53</sup> That is, mediation in accordance with law, mediation in accordance with feeling and reason, mediation in accordance with the law as well as feeling and reason, and mediation in accordance with custom.

‘Yu Xiaosan knocked his head against the floor several times towards the Lus and cried, “I am indeed wretched, and the old men of the Lu family shall deal with me!” Qi said to the Lus, “I suppose that settles the matter; he *has* been beaten, he *has* knelt down. Killing him would go too far.” But the Lus thought the situation had not yet been set right. Then the older Yu approached Lu offering him some money. He said, “Most generous elder brother, these 200 yuan we give to your daughter to mend her health!”<sup>55</sup> So by beating up [Yu Xiaosan], getting him to kneel down and offering money in compensation Chairman Qi eventually brought the Lu family to calm down. Later, Chairman Qi said, “people want face as trees want bark. As you ‘gave him face’ in front of all the people, how could he still be angry!”<sup>56</sup>

Li and Liu consider that the mediator in this case has only looked towards calming down the conflict but not considered ‘what the legal assessment of this case would be’ or (!) how to approach the issue in terms of feelings and reason.<sup>57</sup> This kind of mediation, they consider, ‘does not even get to addressing the problems of protecting people’s legal rights and interests in accordance with feelings, reason, and law.’<sup>58</sup>

So bad, bullying mediation demeans mediation, and offends law, feeling and reason. Conversely, the requirements of ‘basing on law’ and ‘basing on feeling and reason’ are thought to be standards of excellence (requirements) that can be combined.<sup>59</sup> The regulations for People’s mediation as recently interpreted by the Supreme People’s Court in its 2002 rules on handling

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<sup>54</sup> *Ibid.* p. 303.

<sup>55</sup> *Bubu shenzi*, 补补身子 mend her body: this suggests that the (for all that is told, consensual) sexual intercourse she had while unmarried is seen as somehow having damaged her body, an indication of the value attributed to women’s virginity, as putting Yu Xiaosan firmly ‘in the wrong.’

<sup>56</sup> *Ibid.* P. 304. The authors give as reference for this case item 13 of the National People’s Mediation Work Congress’s [compilation of] work experience material.

<sup>57</sup> They do not explicitly address the question of customary law. The implication is that it would at any rate be wrong according to law, feeling and reason, to respect any customary norm allowing for the punishment of the young man in such cases, and that this ‘wrongness’ would override any custom.

<sup>58</sup> *Ibid.* P. 304.

<sup>59</sup> As Li and Liu’s use of the category ‘mediation in accordance with law, feeling and reason’ already indicates.



mediation agreements in civil litigation stipulate that mediated settlements must respect the mandatory (but not the dispositive) rules of the law:<sup>60</sup> beyond this, there is no and should be no requirement that mediation must somehow track or mirror the pattern of rights and duties distributed by law, when the parties choose to negotiate their conflict without reference to these rights and duties. 'Mediation in accordance with' or 'relying on the law' indicates the desire to demonstrate the goodness of mediation by linking it to the general development towards *fazhi*, rule of law or by law, which of course has been part of the political agenda in China for more than twenty years. But it may misleadingly suggest that mediation could perform the function of protecting legal rights, in a less confrontational and cost-effective way than court adjudication.

The authors find justifications for the peculiarities of Chinese mediation practices in its social structure. Despite having described legal assessments as used in mediation, they allow some doubts whether (legal) rights really are an appropriate moral standard for judging human relationships; implicit in this is the concession that mediation does not aim at the protection of legal rights.

'The characteristic weighting of feeling and reason above law, in particular, is due to the fact that the lower strata of Chinese society, especially its rural society, to this day remain a close-knit society. People live together in one location or in one work unit for a long time, and they form all sorts of ties amongst each other. So they don't want to apply the law strictly in ordinary conflicts about rights,<sup>61</sup> in order not to harm/strain these kinds of relationship. This gets to a point where they are even prepared to waive some rights in order to save some feelings [feeling and

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<sup>60</sup> In Article five, subsection four. The Court's rules go far in further 'restricting' the range of settlements to be recognised by the courts; excluding settlements that are 'clearly unfair', and settlements that harm the public interest or a third person's interests.

<sup>61</sup> The expression used here is '*wei yiban de quanli jiufen yange yifa chuli* (为一般的权利纠纷严格依法处理)'. Compare to my earlier comment on Ames and Hall's easy transition from 'rights' to 'application of the law', which misses the point of rights assertion.

reason, *qingli*], in order to improve the relationships in/with their [social] environment.<sup>62</sup>

*Mediation and adjudication; intrajudicial mediation.* In the absence of a working institution for the protection of legal rights like a Western court, it is impossible to pin down any reason why coercive, but non-violent pressure exercised to make a person do what they should do is wrong. I think it simply is not; it is indeed unimaginable that a community should not at some stage resort to coercion in order, at least, to protect itself. Usually there is also a practice of punishment which usually includes violence; but this is an area not to be considered in the present context of mediation (except where, as in the example above, 'mediation' goes wrong.) It is of course also in the absence of state courts that the mediation processes appear (natural and) justified, so far as they respect the moral requirements pertaining to mediation.<sup>63</sup>

But especially in the Chinese countryside, mediation is also an accepted part of dispute resolution by judges in state courts, and is far more widespread than in any Western court practice.<sup>64</sup> The use of mediation in court has been actively promoted by a variety of measures taken by state authorities. For instance, a 2003 Supreme People's Court legal interpretation imposes a duty on

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<sup>62</sup> *Ibid.* P. 305. The authors also draw attention to the Chinese tradition of imperial government which discouraged litigation (*wusong*, 无讼) and encouraged settling them amicably (*xisong*, 息讼). They consider that this tradition still pervades official attitudes towards conflicts in China.

<sup>63</sup> This is reminiscent of Fuller's general claim that different processes have 'different moralities', as expressed in his two essays on mediation and adjudication/arbitration respectively. But it is not clear from the above that that something that might be right in mediation might be wrong according to 'the morality of' adjudication. Fuller, Lon L., 'The Forms and Limits of Adjudication' (1978), chapter one in Freeman, Michael (ed.), *Alternative Dispute Resolution* (New York: 1995), and 'Mediation – its Forms and Functions', (1971) 44 *Southern California Law Review* 305.

<sup>64</sup> Gerke, *ibid.* p. 38. In 1956 intra-judicial mediation was first officially endorsed by what came to be called the 'twelve-character-directive' and this endorsement was confirmed in 1964 by the 'sixteen character directive'. After the Great Cultural Revolution, mediation within courts became a very important part of the legal reform movement initiated in the late 70s by Deng Xiaoping under the slogan of developing 'socialist legality' and 'legality with Chinese

judges to attempt mediation in most civil litigation cases using a new simplified procedure.<sup>65</sup> At the same time, there is a discussion, within China, about whether the widespread application of mediation by courts is in line with the general development toward the rule of law.<sup>66</sup> This discussion tunes in with wider claims that in order to achieve rule of law, the administration of justice (as we may appropriately call it here) must be concentrated on the courts. As extreme instances, the phenomenon of villagers taking ‘justice’ in their own hands occurs, and we find references to ‘moral courts’ or ‘courts on the *kang*’ (the traditional heated brick platform used as bed and sitting place in northern peasant houses), etc. Thus, a recent newspaper report tells us about a group of villagers outraged at the fact that a couple who murdered their own possibly mentally disturbed son in ‘punishment’ for his misdemeanors, including attempting to rape his own mother and generally molesting the villagers, were arrested. The villagers were outraged at the disrespect shown for the principle that ‘great causes of justice obliterate family relationships’ – the idea that to uphold justice, when a relative commits a serious crime he should be punished by his relatives despite (or because of, one might as well say) the family relationship.<sup>67</sup>

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characteristics.’ As part of the reformation of the Code of Civil procedure the principle of *zhuzhong tiaojie/tiaojie wei zhu* has been taken out of the new 1991 code.

<sup>65</sup> See Article 14 of the 2003 Supreme People’s Court judicial interpretation no. 15 ‘SPC judicial interpretation [providing] rules for the application of the simplified civil procedure rules (*Zuigao fayuan guanyu shiyong jianyi chengxu shenli minshi anjian de ruogan guiding*, 最高人民法院关于适用简易程序审理民事案件的若干规定 (法释 (2003)15 号)].

<sup>66</sup> Peerenboom’s *China’s Long March Toward Rule of Law*, in contrast for instance with Lubman’s earlier synoptic account of Chinese law, deals with mediation only in *passim*. But see his concise discussion at pp. 162 ff. He concludes that the strength of mediation would not mean court adjudication was not required. This conclusion may well be supported. But how valuable, with reference to China, is the argument that courts are needed because ‘without the credible threat of suing in court, the parties would have less reason to reach agreement through litigation?’ See Peerenboom, p. 162. Such credible threat cannot be said to have existed in rural China at least over recent decades, and still Chinese mediation could work, in some instances, to effect just dispute resolution. – Peerenboom’s criticism, too, that Chinese mediation was frequently coercive, seems superficial, for reasons given in the main text.

<sup>67</sup> Chen Jun (陈军), ‘The law does not recognise the principle of punishing one’s relatives to uphold justice (*Falü bu ren “da yi mie qin”*; 法律不认“大义灭亲”)’ 12 May 2004, available at

There are two main areas of concern: one is whether mandatory or quasi-mandatory 'imposed' mediation is acceptable; the other, whether judges can successfully perform the roles of both mediator and judge.<sup>68</sup> I consider the second question to be the more central one. Parties in imposed mediation may still agree not to, or unilaterally refuse to, settle. But a judge who works toward getting the parties to consent to a settlement, performs a role potentially very different from a judge working to protect the parties' legal rights. The mediating judge may, for instance, strive for familiarity and confidence in a way the adjudicating judge will not. But while the fact that the mediator may turn himself into a judge in adversary proceedings may evidently threaten the success of mediation, it is difficult to see why the judge should not be allowed to attempt mediation by making suggestions, for instance, for a settlement. Of course, judges in some Western systems are also enjoined to suggest settlements to parties in civil litigation ('at all stages of the procedure') though they may not always be eager to do so.<sup>69</sup> There is no deep, necessary contradiction between the role of a judge and a mediator, but problems may arise in practice in various forms. One is that judges may abuse their supposed duty to mediate by refusing to adjudicate, because the former is easier for them. Another is with judges using information they have obtained confidentially in a previous mediation attempt.

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[http://news.xinhuanet.com/legal/2004-05/12/content\\_1465070.htm](http://news.xinhuanet.com/legal/2004-05/12/content_1465070.htm). The son was suffering from a head tumour. This Article also comments that such cases have been frequent in recent years.

<sup>68</sup> For a relatively early discussion of this topic Shi Fengyi, '*Tantan Renmin Tiaojie de jige renshi wenti*' [trans. 'Talks on the Understanding Problems of People's Mediation'], *Faxue Yanjiu* 1988 no. 4, 75; Ji Weidong 季卫东, '*Fazhi yu tiaojie de beilun* 法制与调解的悖论' [trans. The Conflict [rather contradiction] between Legal System and Mediation'], *Faxue Yanjiu* 法学研究 1989 no.5, 21; Zhu Changli (朱昌礼), 'Study on problems with undue intervention in mediation (*Guanyu renmin tiaojie ganyu wenti de yanjiu*, 关于人民调解干预问题的研究', originally translated as 'Some Problems of Mediation by Common People in China'), (1999) *Faxue Yanjiu* (法学研究) no. 5, 79.

<sup>69</sup> Compare, for instance, section 278 of the German *Civil Procedure Law*.

Both these questions are indirectly addressed by the Supreme People's Court's new draft rules on intrajudicial mediation, which have been posted on the internet to invite discussion and comments. For instance, the rules specify that the initiation of mediation must be based on consent or on a law prescribing mandatory mediation, and details groups of cases in which mediation should be carried out, but also of cases where mediation is prohibited. This latter group includes cases 'concerning the public interest' (Articles 3, 4). In the context of court appeals, mediation is to happen only if the parties so wish (Article 14). Regarding the specific work methods of the judge as mediator, it is prescribed that mediation is normally not public, and that judges may 'carry out mediation work on' the parties separately, but only if they do not object (Article 10). In contrast to People's Mediation settlements, intrajudicially mediated settlements have the status of a judgement acquiring legal effect like judgements, and can be coercively enforced according to Article 35. They can also be challenged but only in the retrial (*zaishen*) procedure before the court, on account of not being valid.<sup>70</sup>

As early as 1994, an article under the title 'pre-litigation mediation – much trouble, little benefit'<sup>71</sup> complained about the practice of courts trying to mediate cases before even properly accepting them for litigation, saying mediation of

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<sup>70</sup> I comment on this type of procedure below. 'Supreme People's Court's rules on relevant problems regarding judicial mediation work (Draft inviting comments) (*Zuigao renmin fayuan guanyu renmin tiaojie gongzuo ruogan wenti de guiding (zhengqiu yijian gao)*, 最高人民法院关于人民法院调解工作若干问题的规定 (征求意见稿)', 10 February 2004, available at [http://news.xinhuanet.com/legal/2004-02/10/content\\_1306657\\_1.htm](http://news.xinhuanet.com/legal/2004-02/10/content_1306657_1.htm).

<sup>71</sup> Zhu Xiaozhen and Fang Longhua, "Pre-litigation mediation: much trouble, little benefit – on reasonings by the Mufan City Intermediate Court (*Suqian tiaojie* "bi duo li shao – yu Mufanjiang shi zhongji fayuan shangque" 诉前调解弊多利少 — 与牡丹江市中级人民法院商榷)", (1994) *Faxue* (法学) no. 4, 20.

this sort was against the principle of the rule of law, or rule 'by' law (*fazhi* 法治)<sup>72</sup> and represented illegitimate 'rule by men' (*renzhi* 人治).

'As a conflict can [sometimes] not be avoided or have irreversible effects and causes of existence, and because moreover, any conflict in reality always contains an inherent danger to the actually existing legal system, the state and its authorities/organs (such as judicial authorities) must resolve conflicts through the real law and procedures in order to eliminate entirely any behaviour contravening the law. Litigation is one form of conflict resolution and stands for an historical progress, for mankind parting with uncivilised 'self-help'. And moreover because it is a phenomenon of rationalisation, it represents the most standardised and, in terms of enforcement, most effective technique...'<sup>73</sup>

The authors suggest that a modern legal system cannot tolerate the resolution of conflicts by *any other* method than adjudication. Only adjudication seems capable of resolving conflicts fully 'rationally'.<sup>74</sup> A more recent comment on the situation of rural courts captures the important point, that reconciliation is of particular importance in the countryside where communities are relatively close-knit. It reminds us, appropriately I think, that support for rights protection does

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<sup>72</sup> The expression *fazhi* 法治 admits of both translations.

<sup>73</sup> Zhu Xiaozhen, Fang Longhua, *ibid.* p. 22.

<sup>74</sup> A more differentiated analysis is offered in a more recent contribution to the discussion based on an account of two 'dodgy' or 'vague legal products', namely, two instances of judicial mediation at a local court, by Yang Liu. His criticism of the second instance of mediation, in which a case of blackmail in the context of a sexual relationship is 'based on non-legal facts' (p. 484) is bizarre. He may be referring to the fact that the court does not ascertain whether a rape alleged to have occurred did occur, or that the ascertainment of facts did not occur in the process of evidence gathering, but then it is in order in civil litigation not to prove facts which neither of the parties dispute. - In the case discussed the plaintiff had a sexual relationship with the defendant's wife and when discovered gave money to settle the dispute (!), but he is continuously harassed and threatened by the aggrieved husband. The 'settlement' stipulates that the plaintiff pay another sum of 'compensation' to the defendant (not the wife!), but that the defendant must immediately stop his threats and blackmailing attempts. This is indeed an instance of mediation gone wrong, but just as in the above instance, this is because there is strong suspicion of criminal behaviour, and because, simply, the mediating judge makes wrong judgements. Yang Liu (杨柳), 'Dodgy legal products: an examination of two cases of local court mediations (*Mohu de falü chanpin: dui liang qi jiceng fayuan tiaojie anjian de kaocha*, 模糊的法律产品: 对两起基层法院调解案件的考察) in Jiang Shigong (强世功, editor), *Mediation, Legality and Modernity: Mediation in China (tiaojie, fazhi yu xiandaixing: zhongguo tiaojie zhidu yanjiu*, 调解, 法制与现代性: 中国调解制度研究) (Beijing: 2001), 484 esp. pp. 492 ff.

not preclude reconciliation, just as justice is not in necessary – is not always in conflict with friendship or with social peace.

‘The judge when hearing a case cannot simply ‘decide and be done with it;’ he cannot not consider the further results [of his judgement]. No, he must, taking the peculiarities of rural societal relationships and the peculiarities of the way peasants think into account, adjudicate cases guided by the idea of ‘valuing social peace’, give weight to mediation and make mediation the primary technique of resolving civil litigation disputes. He must not exacerbate the conflict or leave a conflict in existence; [instead] he must resolve the conflict in the courtroom (...) [He should] from the perspective of the law as well as of feeling and reason seek to persuade and educate the parties and patiently carry out mediation work, so as to make them value social peace, forgive and understand each other, and restore good relations.’<sup>75</sup>

If courts or individual judges seem sometimes particularly bad at mediation, or are heavily criticised for performing the task of mediation, this may at least sometimes be to do with the fact that they do not take the rights and the position of parties seriously enough; that they do not offer the parties a forum for real disagreement and discussion, but rather present themselves as intimidating and ‘silencing’ and end up making wrong judgements. It is difficult to resist the suggestion that this is because court mediation has not offered a proper forum for exchanging arguments and ascertaining the facts. Mediation accommodates disagreement between the parties in a special way, and so does rights protection in court. On this analysis, only courts strong in their ability to protect rights can also be strong in providing just and hence desirable mediation.

Turning to situations where the original conflict to be resolved is one between citizens and state, as the next chapter does, also means turning from the domestic and/or rural setting of cases discussed until now, to a more urban

setting. Unsurprisingly, one of the weakest groups in urban society are China's internal, urban migrant workers from the countryside.

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<sup>75</sup> Guo Wei (郭伟), 'Rural local courts should emphasise mediation more' (*nongcun jiceng fayuan gengjia yao zhong tiaojie* 农村基层法院更加要重调解), 30 April 2004, available at <http://www.chinacourt.org/public/detail.php?id=113763>.



## Chapter Five      Rights and Principles of Legislation in China

*The case of Wang Xingmao.*<sup>1</sup> Wang Xingmao and his 16-year-old son Wang Chaozheng had been working in a coal mine near Lianyuan, a city in Hunan province, for three months, but because Wang Chaozheng had fallen ill, they were on their way home on 22 April 2002. Before they could board their train at the railway station of Lianyuan, they were arrested by the local police and put into the Lianyuan 'station for internment and deportation,' situated at a few kilometres' distance from Lianyuan City, on the grounds that they were not able to show sufficient documentation of their identity, and of being allowed to be in Lianyuan. The following morning, the father was told that 'in accordance with a regulation of the internment station,' unless Wang Xingmao paid 1200 Yuan Renminbi to the internment and deportation station, his son would continue to be locked up there. Wang Xingmao himself was released so that he could go and get the money. He hastened home and tried his best, borrowing from family and friends, but he could not find so much money in such short time. After three days, in despair, he tried to kill himself by drinking a bottle of pesticides. He was taken to hospital and as a consequence of this, the local government made a phone call to the Lianyuan Internment and deportation station, telling them they had better release Wang Chaozheng. But this did not happen and a year later, the whereabouts of Wang Xingmao after his being taken to hospital were not known. When a month later, relatives of the still interned Wang Chaozheng had collected 1000 Yuan Renminbi, and were able to buy him out with this sum, they told him

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<sup>1</sup> This story is told by Cao Yongwen (曹勇文) in the Hong Kong based weekly magazine 'An investigation into the true story of trading people at Hunan Lianyuan's internment station (*Hunan Lianyuan shourongzhan "mairen mairen" zhenxiang diaocha*, 湖南涟源收容站“买人卖人”真相调查), summer 2003, available at <http://www.phoenixtv.com.cn/home/phoenixweekly/116/48page.html>. See also below note 2.

that his father had disappeared. It is reported that Chaozheng 'left [home] in search for his father,' and of him, too, there was no trace a year later.

Wang Xingmao and his son had become the victims of a systematic collaboration between the local police station and the local internment and deportation station which allegedly had thousands of victims.<sup>2</sup> The aim of this collaboration was to extort as much money as possible from migrant workers, whose arrest was 'justified' because they had insufficient papers on them. An 'agreement' between the internment station and the local police stipulated that the police would get a provision of 50 Yuan for every person they brought to the internment station, and there was a 'tariff' system, according to an 'internal regulation'<sup>3</sup> of the station, whereby the sum to be paid by the detainee or his friends or relatives was determined according to their place of residence, and to the grounds on which they were kept interned – as vagrants, drug addicts, prostitutes or prostitutes' clients, etc.<sup>4</sup> The whistle-blower reported that these 'grounds' were faked in the majority (95%) of cases. In his words, the people interned were simply peasants, or rural residents, and workers. The conclusion is tempting that they were interned *because* they were defenceless peasants and

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<sup>2</sup> In a previous interview the official, Guo Xianli, claimed among other things, that between 1996 and November 2002 more than ten thousand peasants (members of the rural population) had been held hostage in this way and that over 3.2 million Yuan RMB in cash had been extorted. It is not clear to what area he was referring to, but from the context it is likely he referred just to Lianyuan. See Chen Feng (陈峰), 'A former internment secretary lifts the dark curtain to make revelations about internment: over a million Yuan extorted in 6 years' (*Qian shourongzhan shuji pilu shourong heimu: liu nian sougua shang bai wan yuan*, 前收容站书记披露收容黑幕: 6年搜刮上百万元), in the newspaper *Southern Metropolitan* (南方都市报), 19 June 2003, at [http://news.xinhuanet.com/legal/2003-06/19/content\\_945548.htm](http://news.xinhuanet.com/legal/2003-06/19/content_945548.htm).

<sup>3</sup> *Guiding* (规定).

<sup>4</sup> To quote from the newspaper article reporting the content of the 'regulation', there was a division into A, B and C types of grounds of internment, and within these types, the 'fees' raised differed according to how long the detainee was detained, and whether he was coming from inside or outside the province (town). So, for instance, a person detained 'for' taking or selling drugs, detained for over ten days and from outside the province would be charged 1400 Yuan whereas a person detained 'for' general vagrancy and begging detained for less than ten days and from the same province would be charged 600 Yuan. The exorbitant fee-taking is (was) partly due to the fact that the stations were under-funded, and that they needed to employ more staff than they were allotted (*bianzhi*, 编制) by the Civil Affairs Bureau in charge.

workers. The unhappy inmates of stations like these<sup>5</sup> were not just systematically 'sold' to their relatives and friends; they were not only subjected to grossly unreasonable 'fees' in the detention stations. In some places, they were also forced to do heavy and sometimes dangerous work on special sites, such as building sites, of which there used to be some in many larger cities.<sup>6</sup>

In May 2003, three legal scholars in Beijing petitioned to the Standing Committee of the National People's Congress to declare the main legal basis for the internment and deportation system, the *Directives for internment and deportation of urban vagrants and beggars*<sup>7</sup> promulgated in 1982 by the State Council, unconstitutional. In June 2003, a case of murder of an interned inmate, under the eyes and indeed with participation of some of the official employees of such a station in Guangdong, was tried, and raised a lot of media attention and public concern. In the wake of this trial, some further cases which had happened between 2000 and 2001, and had gone to court, were also reported in the media – Wang Xingmao's case being one of them.<sup>8</sup> The protest, in public media, internet

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<sup>5</sup> Exceptions did exist. See Shi Yin (师饮), 'Tianjin: an internment station "returned to its origins [its original purpose]" (*Tianjin: bei "huanyuan" de shourong zhan*, 天津: 被“还原”的收容站)', *Southern Weekend* (南方周末), 26 June 2003, available at <http://www.nanfangdaily.com.cn/zm/20030626/cs/zt/200306260708.asp>, on a 'model' station in Tianjin run by an official committed to providing inmates with proper food, education programmes, etc.

<sup>6</sup> For information on forced labour in the Lianyuan internment station, see Chen Xuan (徐璇), 'Shanghai: an end to the tasks of 'no. 936'? (*Shanghai: 936 renwu de zongjie?*, 上海: 936 任务的终结?), *Southern Weekend* (南方周末), 26 June 2003, at <http://cul.sina.com.cn/s/2003-06-27/37117.html>.

<sup>7</sup> *Chengshi liulang qitao renyuan shourong qiansong banfa* (城市流浪乞讨人员收容遣送办法, published by the State Council on 12 May 1982.

<sup>8</sup> For instance, a report on a youth interned in Beijing in 2001, who was declared to have been released after an internment of several days' duration, but never returned home and is lost, in Xinhuaawang (author not named), 'a youth interned for the second time in Beijing Luoyang bei liangdu shourong chuzhan liang nian xialuo bu ming, 一少年在北京洛阳被两度收容 出站两年下落不明' from *Wuhan Morning Post*, at [http://news.xinhuanet.com/legal/2003-07/09/content\\_987615.htm](http://news.xinhuanet.com/legal/2003-07/09/content_987615.htm); a Xinhuaawang report on 25 migrant workers burned to death in a transport van because the van's construction had been altered so as to make it difficult to open the back door, in Lin Jie (林洁), 'In the case of 25 internees burnt to death in a car the court hearing has been adjourned indefinitely (*25 ming bei shourong renyuan shaosi chezhong anjian tingshen bei wuxianqi tuichi*, 25 名被收容人员烧死车中 案件庭审被无限期推迟)' at [112](http://news.xinhuanet.com/legal/2003-</a></p></div><div data-bbox=)

chatrooms, etc., against such practices were then overtaken by the abolition of the *Directives* which are the background, if not a justification, for practices such as the one described above.<sup>9</sup> In June 2003 the State Council announced that as of 1 August 2003, the old *Directives* would be replaced by the new *Directives for Aid for Urban Vagrants and Beggars*.<sup>10</sup> Article eleven of the new *Directives* reads like an enumeration of past malpractices:

‘The employees of the Aid Station must of their own accord respect the laws, regulations, policies and relevant statutes of the state. They are not allowed to impose detention or any measure amounting to detention on the recipients of aid. Verbal abuse, physical punishment, and mistreatment of the aid recipients are not allowed; it is not allowed to instigate verbal abuse, physical punishment or mistreatment. It is not allowed to practice deception, exploitation or embezzlement on the aid recipients. It is not allowed to confiscate articles of daily necessity from the aid recipients; it is not allowed to confiscate their passes/documents or to confiscate material [prepared] for the purposes of [administrative] reconsideration [applications] or accusation. It is not allowed to employ aid recipients as supervisors [of other inmates of the stations]. It is not allowed to make aid recipients perform labour for private purposes. It is not allowed to molest women.’

China had had its first highly publicised instance of abolition of a law on the grounds, simply, that it was bad law. It had infringed constitutional rights, and provided an institutional framework in which further rights violations could occur – although, unsurprisingly, no government official ever stated these reasons. The following discussion of the legislative context of Wang Xingmao’s case is meant to provide a background understanding of situations in which citizens may find

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08/27/content\_1047117.htm; also a report on the internment of an eighty year old in Shenzhen who had forgotten his papers when going out for a walk, which I discuss in detail in the sixth chapter.

<sup>9</sup> I discuss the case of Sun Zhigang in the context of criminal procedure below.

<sup>10</sup> *Chengshi shenghuo wuzhao de liulang qitao renyuan jiuzhu banfa* (城市生活无着的流浪乞讨人员救助办法). See also the Civil Affairs’ Bureau’s *Specific guidelines for applying the Directives for Aid to the urban homeless* published on 21 July 2004 (*Chengshi shenghuo wuzhao de liulang qitao renyuan jiuzhu guanli banfa shishi xize*, 城市生活无着的流浪乞讨人员救助管理办法实施细则).

themselves forced to challenge official measures taken against them. Most importantly, this involves identifying the way in which Chinese legislation fails to give real meaning to the principle of equality before the law.

*The right to move freely and the Internment and Deportation Directives.* If, at the time when their detention was made, Wang Xingmao and his son had been able to protest against the legality of these measures, they might have said something like the following.

‘There are laws which restrict the right to personal freedom and bodily integrity of Chinese citizens, (as there are in practically any country). But these laws must themselves be constitutional. The *Directives for Internment and Deportation of Urban Vagrants and Beggars* are not, because Article 37 of the Constitution says that only the police may detain me. You may call this measure ‘internment’ but of course it amounts to detention.<sup>11</sup> Moreover a court or people’s procurator should approve of this measure. Also, it should be a ‘law’, not a mere administrative regulation, which restricted my right to personal freedom. Not to mention the fact that it is against human dignity to lock people up for days and weeks, just because they are not carrying a certain document with them. Even if you set aside all these arguments against the *Directives*, still, the application of the *Directives* must respect my rights and the principles laid down in the constitution. The laws can’t possibly have been made for authorities, like you, to use them arbitrarily, or for you to exploit your power for financial gain. Therefore, even if you are claiming that the arrest and detention are based on the Directives, on a regulation called the ‘three no’s rule’, or on any other official norm or

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<sup>11</sup> The respective Chinese expressions are *shourong* (收容) and *daibu* (逮捕). The full expression for ‘internment and deportation’ or ‘internment and relocation’ is *shourong qiansong* (收容遣送).

document, they are still illegal.’ This would have amounted to a request to examine the legality, in particular the constitutionality both of the specific administrative decisions and measures taken against Wang and his son, and of the laws and administrative regulations on which these decisions and measures relied or were purported to rely. In China, there is no *court* procedure for the second kind of examination. From a practising lawyer’s point of view, therefore, there may seem to be little need even to embark on the second kind of examination. But the examination itself can of course still be made, and as is argued in the following, must be made, to make sense of Chinese law.

The 1982 *Directives on the Internment and Deportation of Urban Vagrants and Beggars* issued by the State Council (the executive branch of government) only required that beggars from rural families, ‘rogue’ urban residents, tramps or beggars, and other people who lived in the streets and had no livelihood be interned and deported from the cities. For this purpose, extra ‘stations’ (or ‘centres’) were erected in the bigger cities (Article four). The governments of the deported people’s home areas were responsible for re-allocating the deported, according to Article nine. It is only a further, apparently unpublicised *View on the Reform of Internment and Deportation Work*, also issued by the State Council, that requires these measures to be carried out on anyone who does not have the so-called ‘three permits’ or ‘three documents’: identity card, temporary residence permit and work permit.<sup>12</sup> People coming under this rule were called the ‘three

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<sup>12</sup> Zhang Wen (章文) refers to this 1991 ‘[State Council] *View on the reform of internment and Deportation Work* (*Guanyu shourong qiansong gongzuo gaige wenti de yijian*, 关于收容遣送工作改革问题的意见)’ in ‘Why can we only ‘reside temporarily’ in our own country?’ (*Wei shenme zai ziji de zuguo women zhi neng zhanzhu?*, 为什么在祖国我们只能站住)’ *Southern Window* (南风窗), 19 November 2001, reprinted in Wang Zhenmin (王振民), *Case Reader in Constitutional law* (中国宪法案例教程 Tsinghua University, Beijing: 2002) p. 115.

no' people.<sup>13</sup> There was, in every major city, a maze of further regulations regarding all three requirements.

Whether seen in conjunction with such rules or not the unconstitutionality of the now abolished *Directives for internment and deportation* was obvious. They violated the right to personal freedom. Article 37 of the Chinese Constitution states that

'The freedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a People's Procuratorate or by decision of a People's Court, and arrests must be made by a public security organ.

Unlawful detention or deprivation or restriction of citizens' freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited.'<sup>14</sup>

In violation of this rule it was not the police, working under the Ministry of Public Security, but instead authorities under the Ministry of Civil Affairs, which were in charge of the internment and deportation stations, and decided about internment and deportation. Also, the *Directives* could not count as a 'law' in China, but according to the 2000 *Legislation Law* (Article nine in conjunction with article Eight) and the *Law on Administrative Punishment* (Article nine), only

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<sup>13</sup> *San wu ren yuan* 三无人员. Further legislation dealing with the 'three no' includes the Ministry of Public Security's 1995 *Directives regarding application for temporary residence permits* and or for Beijing City alone, the *Beijing administrative regulations on the administration of migrant workers of 1995*. These stipulate that work permits, which are required, are not issued unless one has either got a household registration for the area for which one has got a work permit or a temporary residence permit for that area. - The requirement to have an identity card is now mainly stipulated by the ID card law, according to which persons under sixteen 'may' also apply for an ID card, see Li Yu (李郁), Zhai Huimin (翟惠敏), 'Protecting citizens' legal rights and interests; benefiting citizens' activities in society - a reading of the Residents' Identity Card Law (*Baozhang gongmin hefa quan yi bian li gongmin shehui huodong*, 保障公民合法权益便利公民社会活动——解读居民身份证法, *Legal Daily* (法制日报) of 29 June 2003, at [http://www.legaldaily.com.cn/bm/2003-06/29/content\\_35161.htm](http://www.legaldaily.com.cn/bm/2003-06/29/content_35161.htm).

<sup>14</sup> The Chinese constitution also states, in its preamble, that the exploitation of man by man has been abolished.

a 'law'- *falü*<sup>15</sup> - can restrict the right to personal freedom. These two laws have to some extent affirmed the logic of the 'parliamentary prerogative of restricting rights in China,'<sup>16</sup> which is based on the understanding that a 'law' is an abstract and general legal rule made by a legislature representing the will of the people. According to the 2000 Chinese legislation law only the National People's Congress and its Standing Committee produce 'laws', *falü*. What the State Council makes are but 'administrative regulations'. So the *Directives* were gravely flawed in a formal way, without even considering the question if their restriction of personal freedom (Article 37 of the Constitution) required some further substantive justification.<sup>17</sup>

The history of the internment and deportation system, and of the abolition of the old *Directives*, throws light on a wider issue. The current Chinese system of legislation does not entrust one body or a clearly defined number of bodies to make *general* laws; but without generality of laws, it is difficult to adhere to the most basic requirement that citizens of one legal system be affected, as well as protected, by the law as equals, and to protect their rights.<sup>18</sup> Wang Xingmao was not only wrongfully interned because he did not belong to any of the categories of people who could be lawfully detained. He was also told by the Lianyuan

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<sup>15</sup> *Falü* (法律).

<sup>16</sup> Because in theory the People's Congresses represent the will of the people. According to article five of the 2000 *Legislation Law* (立法法), 'laws shall embody the will of the people, enhance socialist democracy and guarantee that the people participate in legislative activities through various channels' (my emphasis).

<sup>17</sup> And on that head, too, the internment and deportation rules failed. Punishment and imminent grave danger to public safety might have been cited as justifications but were not cited and would not in fact have justified internment and deportation. By the Ministry of Public Security's 2 June 1995 *Directives on applications for temporary residence permits* (暂住证申领办法), specific punishments were already envisaged for offending against the requirement for a temporary residence permit. - No grave danger to public security could have been inferred from the mere presence of homeless people in big cities.

<sup>18</sup> The 2000 *Legislation Law* just mentioned 'privileges' national level legislation in some ways. It therefore reads a bit like an attempt to push the system of People's Congresses in the direction of a parliamentary system.



internment station that 'there was a regulation' effectively setting out tariffs for different kinds of detainees. This 'internal regulation'<sup>19</sup> stipulated exorbitant 'fees'. Of course, such an 'internal regulation' could serve no justificatory function at all.<sup>20</sup> But it is not easy to pin down the exact, technical reason why they should not count as part of Chinese law. The legal system relies on the co-existence of a multitude of 'legislators' ruling over different areas of administration in an almost absolutist way, while on the other hand there is some fiction of unity and coherence. This by itself poses a threat to effective rights protection for Chinese citizens. Even if judicial review of all the current norms were allowed (it is not), it would be technically highly difficult to put into practice, because law should conform not only to the constitution but also to all other higher-ranking law. A truly vast amount of review would be necessary.

The organ for nationwide legislation and the supreme legislative organ is the National People's Congress (hereafter NPC). It makes, alters and amends the constitution as well as ordinary laws.<sup>21</sup> The NPC has a Standing Committee, which can also make laws, but only such that are not deemed 'fundamental' laws.<sup>22</sup> Also the Standing Committee can only legislate outside the NPC plenary sessions, which last for only three weeks a year. Outside the sessions, the Standing Committee is moreover authorised to alter and amend 'fundamental' laws. Although they have (had) such great an impact on some fundamental rights of Chinese citizens, neither the rules for household registration nor the ones for

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<sup>19</sup> The expression used is '*zhanshang guiding* (站上规定)'.

<sup>20</sup> Justification or exculpation in a criminal law context might be a more complex matter.

<sup>21</sup> There are some procedural difference between the passing/altering ordinary laws and those of constitutional rank, in that a two thirds majority is necessary to change the constitution. Given the fact that opposition to proposed legislation is still very timid in the NPC, this latter requirement is of little practical importance. Alterations and amendments of the constitution are frequent. There are moreover laws of constitutional significance, such as the 2000 *Legislation Law*.

<sup>22</sup> Examples are the criminal and criminal procedure, civil and civil procedure, administration and administrative procedure laws.

internment and deportation are (were) laws passed by the National People's Congress.<sup>23</sup> This is symptomatic of the existence of various further mechanisms for the production of 'legislation' in a wider sense. Besides the 'laws' in a narrower sense (*falü*),<sup>24</sup> there is a large number of regulations and so-called 'rules', as well as statutes, etc. (*xingzheng fagui*, *difangxing fagui*, *zizhi tiaoli* and *danxing tiaoli*),<sup>25</sup> passed by a number of different authorities. Importantly, legislation is not restricted to the People's Congresses at their various levels, but occurs at largely through the activity of administrative authorities. There are the 'governments' at the various administrative levels,<sup>26</sup> as well as departments at these levels, which are directly responsible to the national ministries. The 2000 *Legislation Law* attempted to define various authorities' 'limits of power' to 'legislate', according to some of its chapter headings, but the success of this attempt was limited. For instance, according to the *Legislation Law* the State Council has the power to make 'administrative regulations', firstly 'in matters for which the implementation of laws requires this,' and secondly in matters 'within the administrative functions and powers of the State Council as provided for in Article 89 of the Constitution.' Article 89 of the Constitution, however, merely states *that* the State Council may 'make administrative regulations' in its subsection one, without stating any limits of this power. On the basis of just these provisions, then, it appears that the State Council can make regulations –

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<sup>23</sup> For an interesting chart for legislative activities previous to enactment of the legislation law, see Chen Sixi (陈斯喜) and Tong Weidong (童卫东), 人大立法推动依法行政掉咱报告 in Ying Songnian (应松年) and Yuan Shuhong (袁曙宏), *Toward Government under the Rule of Law* (*Zouxiang fazhi zhengfu*, 走向法制政府, Beijing: 2001).

<sup>24</sup> *Falü* (法律).

<sup>25</sup> In Chinese, *xingzheng fagui* (行政法规), *difangxing fagui* (地方性法规), *zizhi tiaoli* (自治条例), *danxing tiaoli* (单行条例), and *guizhang* (规章). See Appendix 'Chart on Legislation', p. 271.

<sup>26</sup> Starting with the State Council (central government, the cabinet) and its Legal Affairs Bureau (*Fazhiban*, 法制办) at the top, and continuing down to the governments of larger cities.

‘legislate’ – *in any matter it pleases*.<sup>27</sup> Article 56 in conjunction with article nine of the *Legislation Law* provides that for matters to be regulated by laws (*falü*), the State Council may be empowered by the NPC or its Standing Committee to make administrative regulations, which are later to be replaced by laws. ‘Matters to be regulated by laws,’ however, are not definitely enumerated in the *Legislation Law*, because the enumeration provided in article eight includes in its subsection ten ‘*other* matters which must be regulated by laws made by the NPC or its Standing Committee (my emphasis).’ Neither from the end of the administrative regulation, nor from the end of NPC legislation, is there a clear account of what should be legislated on by which authority. There is consequently no meaningful ‘distribution’ of legislative power among these two institutions.<sup>28</sup> There is only an attempt to establish a hierarchy among norms already produced by either body, according to which NPC laws are above administrative regulations (Article 78 *Legislation Law*). Incoherence and inconsistency between laws and State Council regulations are thereby not forestalled but instead envisaged and effectively invited.<sup>29</sup>

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<sup>27</sup> Xu Anbiao, an official working in the Law Work Committee of the NPC, describes a dogmatic dispute between a ‘doctrine of [legislation according to] tasks’ and a ‘doctrine of [legislation according to] legal basis’. Xu Anbiao (许安标), ‘Legislative powers according to the *Legislation Law*’, *Legal Daily* (法制日报) of 4 June 2000, available at <http://www.jc.gov.cn/personal/ysxs/fnsx1/fnsx979.htm>. He claims the *Legislation Law*, then new, has clearly defined legislative powers and hence settled the dispute.

<sup>28</sup> With the important exception of article nine of the *Legislation Law*, which states a number of areas to be regulated only by ‘laws’. See above on article nine and the *Directives for internment and deportation*.

<sup>29</sup> It appears that the best the NPC could do to define limits on the part of the State Council to ‘legislate’ and to prevent conflict, would be to authorise it to legislate *provisionally* in as many defined areas as possible, in accordance with article seven of the *Legislation Law*.

Moreover, although there is a hierarchy of legislation, this hierarchy is not theoretically quite clear, and in practice often neglected, so that many local norms contravene norms supposed to be higher up in the hierarchy.<sup>29</sup> For example, article 86 of the *Legislation Law* is intended to deal with conflict between rules (*guizhang*) made by national level ministries and rules made by local (provincial level) governments. It is up to the State Council to decide which of them should be applied. This means that these regulations are theoretically at the same level, and only in cases of practical conflict one will be chosen over the other. - A 1986 Judicial Interpretation was in content very similar to the relevant provisions of the 2000 *Legislation Law*.

Outside the system under the *Legislation Law*, there is an apparently uninterrupted continuity between ‘laws’ ‘regulations’ and ‘rules’ according to the 2000 *Legislation Law*, and lower-order norms, ‘notifications’, ‘provisions’, ‘commands’, ‘letters’, ‘views’ etc., issued by lower level administrative authorities. A generic term for such documents is ‘red-headed documents,’ in a literal translation.<sup>30</sup> The existence of such lower ranking norms or documents is acknowledged, for instance, by article seven of the *Administrative Reconsideration Law*, which addresses the – very limited - extent to which such norms can be subjected to an examination of their legality (see also Chapter Seven).

There are some efforts at ensuring conformity of legislation with higher ranking law, when such legislation is first made and published. For instance, the *Legislation Law* provides for derogation (from the level of provincial administrative regulations downwards) of lower ranking law,<sup>31</sup> and provides in Articles 85 ff. that in cases of inconsistency the higher administrative or legislative organ can alter (!) or annul legislation made by a lower ranking authority, and that the corresponding level People’s Congress can alter or annul legislation of the People’s government (article 88). Attempts have also been made to proceduralise the supervision this hierarchy makes possible, through the so-called *bei’an* – filing – procedure,<sup>32</sup> to discover any contravention of law, or

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<sup>30</sup> *Hongtou wenjian* (红头文件).

<sup>31</sup> E.g. article 64.

<sup>32</sup> *Bei’an* (备案). Thereby, anything that is a mere regulation (produced by a local people’s congress) or rule (produced by a national ministry or by a local government) needs to be submitted to the respective higher ranking authority, within thirty days after (!) promulgation, ‘for the record’, according to article 89 of the *Legislation Law*, and to *The Statutes on filing rules and regulations* (*Fagui guizhang bei’an tiaoli*, 法规规章备案条例), no. 337 (2001), effective as of 1 January 2002, promulgated on 14 September 2001 by the State Council. To give an example, rules produced by a ministry need to be submitted to the State Council. The increased activity in revising legislation is also due to the obligation to bring about legislative transparency according to the General Agreement on Tariffs and Trade following China’s accession to the WTO in

inconsistencies<sup>33</sup> among the norms. A similar system has been introduced in accordance with article 63 of the *Legislation Law* for local People's Congresses' 'regulations' created at the level of comparatively larger cities. The examination and approval mechanism such as the *bei'an* mechanism is useful within certain limits.<sup>34</sup> But crucially, the courts have been left out of the task of review, as is explained in greater detail in Chapter Seven.

The *bei'an* principle allowing for annulment *or* alteration of norms by higher-ranking authorities can only be meaningful if just like in other contexts of government, it is understood that a higher ranking authority has full power over the actions of its lower ranking authorities, and that it can assume its functions and competences at its own discretion. But of course, a lower ranking authority, represented by a lower official (a human being), will sometimes act without the knowledge of and instructions by a higher ranking official (another human being). Unlike a legislator in a federal system, the Chinese state official is not protected against some kinds of central-level interference but required, instead, to excel in an impossible exercise of perfect mind-reading of his higher ranking officials. Unlike a Western judge, who is required to make ideally independent and informed judgements displaying all the virtues of judicial justice, fairness and integrity, he is, it seems, merely required to be deferent to higher authorities. He has the power to make rules by extension of central power, not by virtue of a distribution of legislative power.

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December 2001 (Chapter X of GATT 1994 and *Protocol on The Accession of The People's Republic Of China [to the WTO]*, 10 November 2001, available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc>, especially part C).

<sup>33</sup> The expression used is 'lack of identity', that is, *bu yizhi* (不一致).

<sup>34</sup> It is not difficult to imagine what problems may arise with these approval and filing systems. One is that the examination of the consistency of one regulation with thousands of others will be an arduous task.

The vertical extension of the power to make laws over several tiers of state administration can be explained, to a degree, by the related ideas of unlimited responsibility and comprehensive control. There is also no really 'level' relationship between the People's Congresses and the corresponding People's Governments. Theoretically the People's Congresses are superior as they produce, elect or appoint People's governments, for instance. Although perhaps it should, this does not result in an effective review by the Peoples' Congresses over any other authority, beyond incidental intervention, and it allows for no review at all by the NPC over the rules made by local *governments*.<sup>35</sup> There is no distribution of legislative power in the sense that the powers to legislate of one authority clearly delineated the powers to legislate of another. Only one exception, characteristically recent, to the principle of diffuse extension exists in the form of Article 9 of the *Legislation Law*.<sup>36</sup>

It is important to see how the substantive inequality effected by the subjection of some groups of people to unjustified hardship and the absence of clearly distributed legislative power can combine. 'Legislative' power is extended down to the very lowest ranks of government, and as this power is extended it is also thinned out. The point of this structure cannot be to provide laws so much as to organise rule of officials over people, an important element of such rule being the supervision of officials themselves, according to hierarchy. The attitude it encourages is that of 'I am the law' - an attitude which of course defeats real

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<sup>35</sup> There is no presumption of a command or other hierarchical structure across 'levels' between, for instance, the central (National) People's Congress and provincial governments as is evidenced for instance by the fact that according to article 90 of the *Legislation Law*, the Standing Committee of the National People's Congress has been entrusted with reviewing administrative, local, autonomous and separate regulations (made by lower ranking People's Congresses) but not with reviewing local 'rules' made by lower ranking People's Governments.

<sup>36</sup> Compare also article nine of the *Administrative Punishment Law* (*xingzheng chufa fa*, 行政处罚法), promulgated on 17 March 1996 by the NPC (1996, no. 613).

'law'.<sup>37</sup> But this attitude seems justified, to a degree, by wider ideas about good government in China. The absence of real 'distribution' of legislative power to local legislatures, discussed above, reveals to some extent an attitude of distrust toward officials, translating into a perceived need for their education and supervision, whose limits are dictated only by practical exigencies. Another assumption that appears to dominate political argument in China is that central power can extend but not pervade society, and that means not only that the exercise but also that the justification of the exercise of central state power is limited by 'natural' circumstances. Otherwise, it seems, there would have to be more serious efforts at giving effect to central, national laws.

Tentatively, the idea that officials, while being educated and supervised on the one hand, must also be given 'rope' and power to exercise by themselves, might be traced back to the Chinese idea characterised as 'not overdoing', which in the principles of indirection and redirection is also present in Chinese mediation.<sup>38</sup> In the present context, this idea can be used to justify local power to make and apply rules, to make and enforce commands tailored to the special requirements of a particular place. This is also the background for legislation on the rights of internal migrants to stay in the cities, which is the topic of the next section.

*The right to move freely, the right to personal freedom, and the household registration system.* The internment and deportation rules have now been abolished to a large extent. But these legislative changes have affected only a part of those laws, rules and regulations that turn people from the Chinese countryside

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<sup>37</sup> We can intelligibly speak of 'law' and 'real law' to express requirements not met by mere 'law'.

<sup>38</sup> One possible translation of *wuwei* (无为).

into second-class citizens.<sup>39</sup> As it were in the background of the case of Wang Xingmao and his son, there is the right to move freely and freely to choose their residence in their own country. There is no express mention of the right to move freely<sup>40</sup> in the Chinese constitution in force today. There was such mention in the earlier 1954 Chinese constitution, until the 1972 constitution, in which the right was dropped out, although it is unclear if this could ‘heal’ unconstitutionality of earlier legislation.<sup>41</sup>

In the present Chinese constitution, the right to move freely in one’s own country is implied in the wider right of personal liberty.<sup>42</sup> There are two main reasons for this. One reason for adopting a wide interpretation of Article 37 of the Chinese constitution is that only if the right to move freely is seen as part of the right to personal freedom, can justice be done to Article 12 of the 1966 International Covenant on Citizens’ and Political Rights (hereafter ICCPR).<sup>43</sup> The

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<sup>39</sup> In Chinese, the idea of a ‘dual system’ contained in such expressions as *eryuan hukou guanli tizhi*, *cheng xiang eryuan tizhi* in (二元户口管理体制, 城乡二元体制) is frequently used. For an argument against this perception, reinforced by the legal system, for instance Xu Shengru (许圣如), ‘The “three rural problems” to be included in important [political] agenda, (“三农”问题将列入重要议程’), in 21<sup>st</sup> Century Economic Herald (21世纪经济报道) of 13 October 2003, at <http://www.nanfangdaily.com.cn/jj/20031013/jd/200310130754.asp>.

In some provinces, there is still a basic distinction between ‘rural’ and ‘nonrural’ household registrations in place, whereas others, such as Fujian, Guangdong, and Hunan, have abolished this basic distinction. See Xinhuaawang, ‘The Household registration reforms: marked successes of the reforms in recent years (户籍改革: 我国户籍管理制度改革近年来成效显著), at [http://www.chinapop.gov.cn/rkx/ztd/t20040326\\_10545.htm](http://www.chinapop.gov.cn/rkx/ztd/t20040326_10545.htm).

<sup>40</sup> In Chinese, *qianxiquan* (迁徙权).

<sup>41</sup> The most important piece of legislation restricting the right to move freely was passed on 9 January 1958 by the NPC. (*Hukou dengji tiaoli* 户口登记条例). See Xinhuaawang, ‘The first constitution regulated [contained] the “right to move freely” – calls in the media to restore it’, (*Shoubu xianfa ceng guiding “qianxi ziyou – meiti kanwen huyu huiyu”, 首部宪法曾规定“迁徙自由权” 媒体刊文呼吁恢复*), 8 April 2004, available at <http://taiwan.qianlong.com/23/2002-4-8/45@191772.htm>. Consider that in China, the same body that makes simple laws, also makes changes to the text of the constitution.

<sup>42</sup> Or *renshenquan* (人身权).

<sup>43</sup> China has only signed (in 1998) but not yet ratified the ICCPR, which is not regarded as a self-executing international norm in China; but it can be argued that China is under obligation to effect ratification within reasonable time, and that it has an indirect obligation, as a matter of international law, to respect Article 12 of the ICCPR.



'direct applicability' of the ICCPR in court is disputed in China,<sup>44</sup> but what it demands of its member states is of course not that they cite it in their court decisions, but that they respect it.<sup>45</sup> The second and more substantive reason why a wide interpretation should be given to this article is that there is only a difference in degree between being detained or interned, and being prevented from going where one wants to go. The fact that household registration was, in the case of Chinese peasants (migrant workers), 'enforced' by internment and deportation, and that the legal grounds for internment and deportation and the household registration system have come under attack within little time from each other, serves to illustrate this connection.<sup>46</sup>

One thing that restricts one in one's exercise of the right to move freely is private property in land. Just because one is not allowed to walk on someone else's private lawn does not mean that his right to move freely within his own country is infringed or violated; free movement is not every freedom to move anywhere, just as in the case of the obstacle someone meets who wishes to board a train, but has no ticket for it.<sup>47</sup> On the other hand it is part of the logic of the right to move freely as we protect it, that public spaces such as streets and squares

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<sup>44</sup> The question whether the ICCPR may be cited by Chinese courts is relevant, for instance, because direct application of Article 12 would make it easier to refer to UN Human Rights Commission interpretations of Article 12 for guidance.

<sup>45</sup> See Qin Qianhong (秦前红), 'On the implementation of the two International Human Rights Conventions and on the transformation of the Chinese Constitution (*Lun liangge guoji renquan gongyue de shishi he zhongguo xianfa bianqian*, 论两个国际人权公约的实施和中国宪法变迁)', [http://www.law-lib.com.cn/lw/lw\\_view.asp?no=1724](http://www.law-lib.com.cn/lw/lw_view.asp?no=1724). He considers that courts do have the option of citing international human rights obligations according to the two conventions but makes suggestions for limiting this power to higher-ranking courts. See also on incorporating an explicit right to move freely back into the Constitution, Wu Xue'an (吴学安), 'To carry out reform of the household registration system thoroughly (*Jiang huji gaige jinxing daodi*, 将户籍改革进行到底)', 16 June 2003, at [http://www.legaldaily.com.cn/bm/2003-06/16/content\\_33126.htm](http://www.legaldaily.com.cn/bm/2003-06/16/content_33126.htm).

<sup>46</sup> Several large cities made move to abolish the temporary residence permit requirement. See, for an example, Tian Yu (田雨), *Xinhua*, 'Beijing will abolish the temporary residence permit [requirement within the next half year (*Beijing jiang quxiao jingwai renyuan zhanzhuzheng*, 北京将取消境外人员暂住证)', 21 September 2003, at <http://211.100.18.62/fzdt/xwnr.asp?id=10391>.

<sup>47</sup> For an opposed standpoints on this particular example, see Cohen, G. A., 'Freedom and Money', paper for UCL Colloquium, 11 January 1999.

are equally accessible to all citizens. By contrast in Chinese cities, there is *only* state ownership in land, while there is collective ownership of farmland in the countryside. The state retains ultimate control over land even where rights of use are distributed. Distinctions between publicly accessible space and privately occupied space arise from official approval, habit and circumstances,<sup>48</sup> or in the case of recently constructed buildings they arise from the fact that 'rights of use' in land, limited to a maximum 70-year term, have been sold.<sup>49</sup> This regime reinforces the principle of territorial local rule by government or its officials.<sup>50</sup>

The current household registration system is based primarily on the so-called *Statutes on Household Registration* passed by the Standing Committee of the then NPC in 1958.<sup>51</sup> Most importantly, these stipulate that anyone living in the People's Republic of China must be registered as belonging to a certain household or work unit, with universities, factories, etc. also counting as households (Article 2). Anyone moving out of their household registration area must apply for a 'migration certificate', and people wanting to move from the countryside to a city must submit evidence of having been employed or accepted at a university in the city, or of their move having been approved by the household registration office of the place they are moving to (Article 10). Residence of over three nights in a city outside one's registration area requires a report to the household registration authority - normally the police station - of a registered person or unit one is staying with, for a 'registration of temporary

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<sup>48</sup> There may be but is not always a tenancy agreement.

<sup>49</sup> The state retains control or instance because the right to use in land *including* the property in a newly erected building falls back to the state after expiry of the lease.

<sup>50</sup> Two other areas of social concern at present, the requisitioning of rural land and the demolition of urban houses involve large-scale relocation. In these contexts, too, poor ordinary people are treated as though they had no right to be in any particular place: a reflection, again, of the confusion in land law at present.

<sup>51</sup> As mentioned above the 'statutes' were made by the Standing Committee of the NPC; as such, they would today be called 'law'.

residence' (Article 15), and after residence of over three months in a registration area not one's own one must apply for an extension, or go through the migration procedures. If neither can be obtained, the 'migrant' must return to his registration area, according to Article 16. This provision is the most important one in the context of the right to move freely, because its restriction of this right is so explicit.

The historical background for the household registration system was the shortage economy under Chinese socialism.<sup>52</sup> People were not free agents in an economy supposedly based on market principles ('the invisible hand'); instead, they were part of the big central plan for production and distribution. From the 1950s and into the 1990s, China was still practising rationing and planned economy on certain goods. The ordinary food coupons one got, for instance, were restricted to one's household registration area.<sup>53</sup> One could not, generally, buy such essential goods with money. As soon as the rationing and price controls were dropped, the situation started to change. According to a Ministry of Public Security statistic published in 2003, there were then 130 million 'migrant' people in China – this is about a tenth of the population, and of these, (only!) over 50 million have got a 'temporary residence' permit.<sup>54</sup> As an instrument to control and restrict migration, the household registration and temporary residence permit scheme appeared to have failed.<sup>55</sup>

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<sup>52</sup> For an historical overview see Wu Xue'an (吴学安), 'To carry out reform of the household registration system thoroughly (*Jiang huji gaige jinxing daodi*, 将户籍改革进行到底)', 16 June 2003, at [http://www.legaldaily.com.cn/bm/2003-06/16/content\\_33126.htm](http://www.legaldaily.com.cn/bm/2003-06/16/content_33126.htm).

<sup>53</sup> For special purposes – such as approved travel – one could get 'nationwide' coupons, though.

<sup>54</sup> *Xinhua News*, 25 July 2003, 'China is undergoing a new round of reforms of the household registration system (*Zhongguo zheng tuixing xin yi lun gaige*, 中国正推行新一轮户籍制改革)' at [http://news.cyol.com/gb/news/2003-07/25/content\\_703810.htm](http://news.cyol.com/gb/news/2003-07/25/content_703810.htm).

<sup>55</sup> An increasing number of city governments (or public security bureaus) are coming to this conclusion too.

But household registration is the precondition of a number of state benefits and public services and as such it still works, confirming and aggravating inequalities in wealth among people 'from' different regions.<sup>56</sup> Therefore, a person migrating to another place, such as a city, nowadays faces two kinds of problem. One is illegality, so far as the registration requirement is concerned, because there are so many restrictions on registering at one's actual place of abode. Another is losing out on the various rights and interests attaching to his household registration. With the disappearance of very large scale distribution of basic goods, the household registration system has become the one legal requirement that hinders people from moving to where they want, within their own country.<sup>57</sup> Individual cities, such as Beijing, have created further regulations to control migration into them, in a manner again posing the problems of 'legislation' already expounded above.<sup>58</sup> In the early nineties, there also arose a practice of selling and buying household registrations in some places, or - again - of raising exorbitant 'fees' for migrants.<sup>59</sup> In the later nineties, the ministry of security and provincial governments stopped these practices, because it was

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<sup>56</sup> To date, it is one's household registration that determines where (and due to the poverty of some regions, effectively whether) one is entitled to medical care, where one's child is entitled to kindergarten and schooling, where one can get social security, and where one can be assisted in finding a workplace. See generally Wu Xue'an (*supra* note 50).

<sup>57</sup> At the same time, life in the cities became more attractive, so cities started "fencing in" their wealth. The title of a 2001 article in *Legal Daily* is 'Walking out of the town walls - a serialised report on the reform of the household registration system', by Sun Chunying (孙春英), *Zouchu "weicheng" - huji zhidu gaige xilie baodao* 走出“围城”——户籍制度改革系列报道 (third part), 21 September 2001, at [http://www.legaldaily.com.cn/gb/content/200109/19/content\\_24489.htm](http://www.legaldaily.com.cn/gb/content/200109/19/content_24489.htm) (see below).

<sup>58</sup> For example, the Beijing City government's 13 June 1995 *Regulation on the Handling of the household registration of migrant workers coming to Beijing* (*Beijing shi waidi laijing ren yuan huji guanli guiding*, 北京市外地来京人员户籍管理规定) in its article 6 stipulates that the issuing of residence cards must be restricted by the district and county governments of Beijing, which must each set an adequate ratio of outside people to 'local' people not to be surpassed. The residence permit is to be refused, for instance, to women of child bearing age who have no certificate stating their marriage and child-bearing status (*hunyu zhuangkuang*, 婚育状况).

<sup>59</sup> See the article by Xu Haitao (许海涛), 'Shijiazhuang entirely removes the [bamboo] fences (*Shijiazhuang quanmian chechu huji fangli* 石家庄全面撤出户籍藩篱)', 13 August 2001, available at <http://www.unn.com.cn/GB/channel19/49/117/200108/13/92230.html>.

realised that the rural workforce was actually needed. All this testifies to a sustained effort to continue and extend control, as well as to a conviction on the part of (a significant number of) government officials that control of migration into cities is necessary. There are reforms, especially toward facilitating the registration in areas where rural workforces are actually needed, but there is as yet no clear sign that the system itself will be scrapped nationwide.<sup>60</sup> Better ways are being sought for selecting those whose migration into cities is desirable from the point of view of (certain) officials – while government will remain in control, both of people and of goods distributed, and seek to improve distribution criteria. (At the same time, the new phenomenon of labour shortage in cities shows how much these cities depend on cheap migrant workers with little protection.)

A registration requirement as such does not seriously affect one's freedom to move, but the household registration system is not a mere registration but a 'control' system, with control extending both to migration and to the distribution of goods such as social services. The Chinese constitution, so far as it proclaims citizens' rights – any citizens' rights -, affords protection against this system in its article 37 but only slowly, as poor peasants or rural residents stream into the by comparison increasingly richer cities, are they beginning to assert the rights they have.

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<sup>60</sup> In 1998 the State Council is reported to have circulated, with an 'approving notice', the Ministry of Public Security's (internal) *Views on the handling of problems relating to the household registration (guanyu hukou wenti de yijian, 关于户口问题的意见)* to administrative authorities. Their basic goal was to set up standards to facilitate the transfer of household registration. Another set of such *Views* circulated in May 2001 is reported to have contained an admonition to get rid of quotas for 'immigration' to *small* towns and cities and discriminatory treatment in these places, according to a report by Zhao Huiying (赵慧英) in the *China Macroeconomic News Net* (中国宏观经济信息网) at <http://www.macrochina.com.cn/zhzt/000093/005/20010823017321.shtml>.

*Supervision and control: the right to equality and the rural and urban classes in China.* Laws such as the one on household registration have furthered the creation of two different classes of Chinese citizens. The basic distinction is between peasants and the city population. When members of the poor rural population come to the cities, they become part of an urban underclass excluded or partly excluded from many essential social services (education, social security, etc.) and also, for instance, excluded from the right to vote for householders' or village committees (local self-government agencies) in the places where they actually live.<sup>61</sup>

At the national level, the law providing a registration requirement is of course a general law. In that sense, it satisfies the requirement that everyone must be treated equally. The mere fact, too, that there are differences in wealth levels is hard to criticise as unjust, if for no other reason, then because 'welfare' and 'wealth' may make unpersuasive metrics for significant social equality.<sup>62</sup>

But this does not mean that the guarantee to equality before the law (Article 33 of the Constitution) could have no significance at all for the 'class' divide between urban and rural (migrant) Chinese citizens. For a more specific standard for assessing whether the right to equality has been infringed by a particular instance of differential treatment, we may assume that when a social service is in principle available to certain people, the right to equality before the law must *at least* mean that there must not be long term discrimination among applicants all fulfilling the proper preconditions of the social service in question.<sup>63</sup> It means at

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<sup>61</sup> Ma Fuyun (马福云), 'The definition of the status of resident entitled to vote against the background of the household registration reform' (*Huji zhidu gaige beijing xia de xuanmin zige jieding*, 户籍制度改革背景下的选民资格界定, unpublished draft).

<sup>62</sup> For the position I am adopting here see Dworkin, 'What Is Equality?' Parts I-IV, especially Parts I and II, reprinted in *Sovereign Virtue* (Harvard: 2001).

<sup>63</sup> In the short run 'discriminatory' treatment may sometimes be inevitable.

least that, for instance, of two Chinese children who are of the same age and live in the same neighbourhood, one should not be given far more school education, from public means, than the other; one should not be denied access to publicly financed education, indirectly at the benefit of the other. It may be that the right to equality before the law is not exhausted by this claim.<sup>64</sup> Equality before the law, on such an interpretation, is not just a right to be treated 'according to the rules,' or 'to be treated the same in the same case,' it is also a right to have as little differentiation as possible, because it rules out insignificant differences as basis of differential legislation. If this is true, then certain aspects of 'household registration rights and interests' infringe the right to equality before the law, and are unconstitutional for this additional reason.<sup>65</sup>

The right freely to move in one's country reflects the intuition just mentioned: an important reason why people should have the right to move freely within their own country, is that otherwise, inequality between the people of different regions is likely to be confirmed and aggravated more and more.<sup>66</sup> This understanding emphasises the close connection between liberty rights and the right to equality. At the same time, the connection confirms that further principles of equality are important preconditions of a proper protection of liberty rights. Importantly for China, among these are certain principles of redistribution

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<sup>64</sup> Whether or not it is exhausted, it is at any rate difficult to imagine how to rule this one modest claim out, except if the idea of equality were completely emptied of its moral sense, and understood as mere generality or universality of application (of a different substantive principle). For a more formal idea of equality in a legal context, though, see Raz, Joseph, 'Equality', Chapter 9 of *The Morality of Freedom* (Oxford: 1986).

<sup>65</sup> One might ask, why favour a 'Ningxia' registered child living in Beijing, along with a Beijing child with a Beijing household registration, and neglect the child registered and living in Ningxia? The answer must be that the ready availability of resources that could be used in equal amounts for the children living in Beijing, is significant for distributional justice, but also that a duty to redistribute extends to providing for the child in Ningxia.

<sup>66</sup> It is not true, to answer a possible objection, that current migration control in large cities serves the purpose of restricting the influx of migrants to an actually needed or tolerable number: in 2004, shortages of labour in the big cities arose.

through taxation, for instance ('justice of taxation'), or of equality in the use of public resources. In societies adhering to the principle of a separation of legislative, adjudicative and executive powers, it has become difficult to describe the distribution of resources and the distribution of (political) power as directly related. But in a simpler set-up, such as the one described for contemporary China, the way power is distributed can also define the way resources are distributed. The system described here depends, as already mentioned, to a certain degree on a fiction of incorporation or unity of lower and higher tiers of government. It is also one of ideally comprehensive control or 'management' (*guanli*)<sup>67</sup> and at the same time, helplessly as it were, tolerating wide areas of non-control. There is no effective mechanism in place – there is not even a perception of the requirement for a mechanism, it seems – to take such territorial control away from the city governments.<sup>68</sup> The absence of certain legally entrenched principles of equality is not accidental. One should recall that the party state's control over resources was initially founded in an egalitarian concern, and actually helped to reduce inequalities. In this context, the co-existence of the state ownership regime with the household registration system, but also with the set-up of the legislative process serve to explain each other. All these systems reflect the same (paternalistic) attitude of administering for the good of the people administered. A (governmental) department of whatever sort will regard it as its natural privilege to make rules and regulations for those 'below' it.

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<sup>67</sup> *Guanli* (管理).

<sup>68</sup> We have had an opportunity to note, above, not only that the Beijing city government was entrusted with the task of determining quotas for immigration (temporary residence) each year, but also that the Beijing Public Security Bureau felt entitled to announce the abolition of the temporary residence permit 'for its own territory', even though this appears to contradict national legislation on the matter.



The idea of *guanli* has tradition in China, as has that of supervision.<sup>69</sup> In a recent publication on *New theory of the Confucian philosophy of guanli*, the Chinese scholar Sun Juyou explains the connection between basic Confucian ideas and the idea of regulation, management and control in the following way.

‘The problem at the heart of the discussions among Confucian philosophers can be analysed into two aspects: one is, how to improve one’s self (*xiu shen*),<sup>70</sup> and one is, how to secure peace among people (*an ren*).<sup>71</sup> These two problems are really both the problem of how to manage mankind and one’s self (*guanli renlei zishen*).<sup>72</sup>

While *guanli* has a special Chinese tradition, note that this is also the term used to translate the English term ‘management’. It could almost appear as though some Chinese scholars had all the more happily addressed ‘management’ theories from the West because of this dual ‘rootedness’ of the term, and the fact that there are so many Western management theories around now means that *guanli* is all the more widespread in recent legal, economic, and political publications in China.<sup>73</sup>

Today, the practices of supervision and control appear to have got the better of the original political aim of such control in the People’s Republic. This aim

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<sup>69</sup> Many relationships, such as between the People’s Congresses and the judiciary and administration, as well as the relationship between ‘the people’ and government, have been characterised as relationships of supervision (*jiandu*, 监督). There is an element of ‘watching’ at the same indicating a certain distance between or separateness of the person watched and the watcher. By contrast, *guanli* indicates less separateness and a more immediate ‘channeling’ (管) and ‘setting right’ (理) of activities as they happen.

<sup>70</sup> *Xiushen* (修身). A modern dictionary translates with greater flourish, ‘to cultivate one’s moral character.’ See entry at p. 2158 in *The Contemporary Chinese Dictionary* (Foreign Language Teaching and Research Press, Beijing: 2002).

<sup>71</sup> 安人. *The Contemporary Chinese Dictionary* (Foreign Language Teaching and Research Press, Beijing: 2002) translates 安民 as ‘to bring peace to the people’. In the above text there is a juxtaposition but also connection between 身 and 人, ‘self’ and [other, all] ‘people’.

<sup>72</sup> Sun Juyou (孙聚友), *New Theory of the Confucian Philosophy of Management* (*Rujia guanli zhexue xinlun*, 儒家管理哲学新论 (Jinan: 2003) at p. 4.

<sup>73</sup> To give just one example for this, the book *Crisis Management* (*weiji guanli* 危机管理) also relates ‘management’ to Confucian tradition, quoting as follows from the *Book of Great Learning* 大学. ‘To “be in peace without forgetting crisis, to rule without forgetting unruliness/chaos, to live without forgetting death” is the most important experience to be drawn from the history of “ruling the country and pacifying the states”.’ Xue Lan, Zhang Qiang and Zhong Kaibin (薛澜, 张强, 钟开斌), *Crisis Management* (*weiji guanli*, 危机管理, Beijing: 2003), at p. 8.

was to distribute resources evenly (justly, equally), but today political 'management and control' practices, as we have seen in the context of the household registration system, work for a confirmation of social inequality rather than against it. As an alternative, as it were, to justifiable rights to equality, there is the old ideal of equality achieved through socialism as a pre-stage of communism. But the ultimate socialist state to be achieved has been removed ever further away from people's life horizons over the recent years, as in official parlance China has regressed into a future of 'a long term primary stage of socialism.'<sup>74</sup> While the idea of equality is of course important to communism, it appears therefore that in recent years, the 'communist' agenda has assumed something of the insincerity of a 'civil religion'.

Just as the mechanisms of the protection of equal *rights* and the *right* to equality are alternatives to benevolent dictatorship for the centralised and egalitarian distribution of goods, so legal procedures are alternatives to procedures of supervision, discipline and control, as used in contemporary Chinese state and party administration. Communist party discipline and state control continue important as a means of implementing benevolent (egalitarian) policies whose aims, if made justifiable as equal rights and rights to equality, might present a great challenge to government and the party.

*Upholding abstract principles.* The preceding discussion of two related areas of Chinese law has provided examples of, on the whole, bad legislation, whose badness increases the more local and detailed it becomes. The characterisation of

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<sup>74</sup> According to the preamble of the Chinese Constitution as amended in 1999. Note the highly interesting comparisons drawn by some between 'limited responsibility company' and 'limited responsibility government'. For example, in Wang Zhenmin (王振民), *Casebook on Constitutional Law* (*Zhongguo xianfa anli jiaocheng*, 中国宪法案例教程, Tsinghua University Law School, Beijing (unpublished), August 2002) p. 14.

laws such as the internment and deportation and the household registration rules relied, in the first place, on certain civil rights standards, in particular the standard of the right to personal freedom as guaranteed by the Chinese Constitution. Then, as we turned to specific practices this legislation has given rise to, official corruption at a very large scale came into focus – from profiteering on the part of officials, over exploitation of power, to ‘downright’ criminal conduct. This second kind of defect could be described as an abuse of the existing laws and regulations, whereas the first kind of defect could be described as insufficiency of the legislation itself. But the constitutional rights angle from which my discussion started, and the peculiarity of Chinese legal and administrative practice as a maze of more and more local and specific ‘norms’, demonstrate the superficiality of such a distinction. There is no significant difference between ‘legislation’ and abusive official practices ‘based on’ such legislation in China; there is neither a clear way of distinguishing the ‘legislation itself’ from the abuses, nor is there a way of completely separating the standards by which both should be judged. In Chinese law, it is first and foremost the Chinese Constitution, which demands that all state conduct conform to constitutional principles. It is the constitution, especially constitutional rights that allows to distinguish real law from ‘law’ that must not be applied, because it violates constitutional rights and because it violates justice. We must conclude that the worse a legislative framework, the more ‘real’ law is represented by (consists of) constitutional, that is, certain selected moral principles alone. But how to protect such principles in practice? The following chapters address various difficulties posed by this task, by considering the ways in which ordinary citizens can challenge unlawful state actions.

## Chapter Six      Appeals to state authorities

*The problem with self-control.* There is a general problem with powerful institutions controlling themselves, or to be precise, with having some of its members supervise what the others do. This is particularly true of the police, for as perhaps the most prominent and immediately powerful administrative authority in civil society, the police are also called upon to protect people's rights.<sup>1</sup> It is as reasonable as it is paradoxical, then, to think of appealing to the police when, for instance, one has been arbitrarily arrested by it.<sup>2</sup> When such an appeal fails, and also in cases where such an appeal would not be warranted by the gravity and urgency of the situation,<sup>3</sup> the reaction to wrongful administrative acts will have to be some kind of review of the legality of the act in question, be it an act of legislation or an administrative measure or decision specifically targeting oneself. From the perspective of the individual concerned, relief *of some sort* can only be provided if the revision process is in some way addressed to him; at least, say, by informing him of the outcome of the review procedure.

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<sup>1</sup> As Article 2, paragraph 1, of the Chinese *Police Law* (警察法) states.

<sup>2</sup> A journalist named Ye Zhiqiu reports his own internment experience in *Southern Weekend*, without naming the place and time where the internment happened. He describes going for a walk in the streets in the small hours one day, without taking his temporary residence card with him. He is arrested; his ID card and work permit are not considered sufficient since they show him not to be a 'local' person, and he is ordered to board a van already packed with other victims, and driven to an internment station. 'We were all escorted into the tiny 10 square metres large room. A few people tried to ring 110 from their mobile phones and to report to the police, but the answer they got was only: "That's the business of the branch police office [*paichusuo*]. We're not concerned with [*guan*] this." I really don't know whether they didn't intend to be concerned, didn't dare to be concerned, or just could no longer be bothered with these kinds of appeals.' In the morning, everyone was taken back to their neighbourhood, but only after a fee of ten Yuan per person had been collected from them. Ye Zhiqiu (叶之秋), 'My own experience of internment (*Wo de yi ci shourong jingli*, 我的一次收容经历)', *Southern Weekend*, 19 June 2003, available at <http://www.nanfangdaily.com.cn/zm/20030619/wh/bxjs/200306191190.asp>.

<sup>3</sup> There is theoretically also the option of obtaining an interim court injunction against a detention measure; in the context of internment and deportation, I have no knowledge of any case in which such an injunction was applied for.

All of the mechanisms for the review of wrongful administrative conduct currently in place in China may, occasionally, yield good results in the sense of reducing, reversing or forestalling bad practices. But the conclusion of the third chapter was that special importance attaches to rights assertion, and that rights must not be confused with ‘interests, pre-morally conceived.’ Using this as a starting point, it is argued here that none of the available forms of administrative review in China can replace rights protection by courts. Indeed some of them appear to hinder rather than promote the building up of an effective judicial review mechanism, for instance by usurping judicial functions.

*Correction by internal decision.* When a concrete administrative act has been made, the acting authority can become active again of its own accord, to correct a mistaken or wrongful decision. The administrative authority can also be ‘supervised internally’, by way of commands from a higher level instance of the same branch of administration.<sup>4</sup> Textbooks on the administrative reconsideration procedure mention as options available to the administration to correct its own mistakes the ‘revocation’<sup>5</sup> of an ‘concrete’ administrative act, and the ‘declaring invalid’ (invalidation) of such acts.<sup>6</sup> This denotes administrative decisions or other measures or actions taken by public authorities, directly addressing and affecting an individual Chinese citizen or number of citizens. By contrast

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<sup>4</sup> Subordinate level officials will often seek instructions from ‘above’.

<sup>5</sup> *Chexiao* (撤销). Difficult translation – in some context, ‘annulment’ seems correct.

<sup>6</sup> In the context of the more modern administrative reconsideration procedure. But in principle, these are also the options available to authorities acting unprompted. Using a comparison with German administrative law, one might consider that either an administrative act has been illegal; in that event, the act generally ought to be considered null and void from the beginning. Or it has not been *illegal* but should merely be revoked with effect from the time of revocation. A related question would be if citizens had reason to place trust in the legal effect of legal administrative acts, trust which might deserve protection. See Luo Haocai (罗豪才, general editor), *Theory of Administrative Law (Xingzhengfaxue, 行政法学*, Beijing: 2001) at p. 272, on kinds of decisions about administrative reconsideration.

according to a Supreme People's Court judicial interpretation of the relevant Articles of the *Administrative Litigation Law*, 'abstract' administrative acts are 'all documents of a normative character which are issued/publicised addressing an indefinite number of persons and which can be applied in multiple instances.'<sup>7</sup> So we have already encountered such 'abstract administrative acts' in the form of administrative legislation, in Chapter Five. Abstract administrative acts cannot be challenged in court. However, the need to take affected people's wishes or their own perception of their own interests, into account when deciding on 'correcting' administrative decisions by itself illustrates the important fact that an administrative act creates a relationship between the administration and a citizen. An administrative mistake affecting citizens is not like an error to be corrected for the sake of correction, without consideration of the person(s) affected. Within the relationship created between a citizen and a state authority or official, an apology or some form of recognition of the mistake may become an important issue, as some of the examples given in the following show.

It will be remembered that in the case of the *Directives for Internment and Deportation* the State Council, which had created the *Directives*, replaced them by a more enlightened new regulation called *Directives to Aid the Homeless*. This was an act of self-correction. According to Article 89, subsections 13 and 14 of the Constitution, the State Council is entitled to alter or annul 'inappropriate commands/orders, directives and rules'<sup>8</sup> made by national ministries and

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<sup>7</sup> See Article 3 of the Supreme People's Court's Judicial Interpretation no. 8 (2000), (*Zuigao renmin fayuan guanyu zhixing xingzheng susongfa ruogan wenti de jieshi*, 最高人民法院关于执行行政诉讼法若干问题的解释). The problem with abstract definitions such as 'allowing for multiple application' or 'being addressed to more than one person', moreover, is that these can be deliberately used in order further to reduce the application of administrative reconsideration and litigation.

<sup>8</sup> *Guizhang* (规章).

commissions’<sup>9</sup> and ‘inappropriate decisions’<sup>10</sup> and orders<sup>11</sup> made by local governments’ – decisions, that is, made by lower ranking authorities within an internal hierarchy. A further procedural basis for these kinds of review activity is the ‘*bei’an*’ procedure, which has already been discussed in the previous chapter. In practice, it appears that applications for administrative reconsideration, applications for the review of administrative rules, and exercise of the review right according to the *bei’an* procedure can be combined, according to the provisions of the *Legislation Law* on filing regulations and rules, and the 2001 State Council’s own *Regulations on the Filing of Regulations and Rules*.<sup>12</sup>

This example shows how in contrast to courts, the State Council can in some cases make decisions affecting the ‘legal’ basis of administrative decisions, rather than only such concrete decisions themselves. As the scope of its review is relatively wide, an application to the State Council or its Legal Affairs Bureau<sup>13</sup> may be more effective even than litigation in court; and the same applies to administrative reconsideration by local governments’ Legal Affairs Bureaus, where the legality of lower order ‘administrative legislation’ can be reviewed.<sup>14</sup> Members of the State Council’s Legal Affairs Office perceive themselves to be practically performing the functions of a court. Conversely, this weakens the role

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<sup>9</sup> Some institutions at national ‘ministry’ level are called ‘commissions’, for historical reasons.

<sup>10</sup> *Jueding* (决定).

<sup>11</sup> *Mingling* (命令).

<sup>12</sup> See the State Council’s *Statutes on Filing Regulations and Rules* (*Fagui guizhang bei’an tiaoli*, 法规规章备案条例), effective as of 1 January 2002.

<sup>13</sup> *Fazhiban* (法制办). For administrative reconsideration or in the course of a ‘letters and complaints’ procedure. On both, see below.

<sup>14</sup> For example, consider the above-mentioned announcement of new rules of the Beijing City Public Security Bureau regarding the requirement of temporary residence permits. Functionally, these would be equivalent to Administrative Rules produced by ministries at the central (national) level.

of the 'real' courts in charge of administrative litigation. For governments at provincial level, similar bodies exist. with regard to revising lower level norms.<sup>15</sup>

So recent legislation has in various places recognised the possibility that citizens may make suggestions toward government, be it the State Council or one of its lower branches, regarding the change or annulment of administrative decisions of any kind. Note that the abovementioned State Council's own *Statutes on Filing Regulations and Rules*, effective as of 1 January 2002, allow organisations in society as well as individual citizens to 'suggest' the review of a norm to the State Council, according to its Article 9. A further such new mechanism will be considered in the context of the question of constitutional review in Chapter Eight. As for the State Council's new *Statutes*, nothing but the mere right to make 'suggestions' is conceded by the new regulation.<sup>16</sup> These suggestions, as has been pointed out before, seek assent from government seen as one whole of hierarchically interconnected institutions.<sup>17</sup> They make it difficult to claim anything uncompromisingly as of right.

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<sup>15</sup> A report on the review activities of the Legislative Affairs Office of the [government of] Henan Province in 2003, says that during the past half year's review of documents submitted in the course of the *bei'an* procedure, it was discovered that 19 percent of these were 'illegal or inappropriate' *Weifa huo budang* (违法或不当). The author comments, 'documents bearing the red stamp should represent respect for the law and incarnate the authority of the state. But with some people, it is alright to alter the codes according to their own fancy, and to 'compose and circulate' as they please. It is really impossible to imagine how these kinds of documents ever came into existence, how they came to be printed and published, and it is also impossible to imagine what kind of results they may have, if used for guiding the work of lower/relevant authorities [*zhineng bumen*].' He Shang (程尚, a pen name), 'Why do the "problematic documents" make up 19 percent?' ("Wenti wenjian" weihe zhan le 19%, "问题文件" 为何占了 19%') *Southern Weekend* (南方周末), 7 July 2003.

<sup>16</sup> Wang Zhenmin points out that some of the newer mechanisms for making suggestions are due to undertakings in the context of China's entry into the World Trade Organisation (hereafter WTO). Wang Zhenmin (王振民), *Casebook on Constitutional Law*, Tsinghua University Law School (*Zhongguo xianfa anli jiaocheng*, Qinghua Daxue faxueyuan, Beijing 2002 nian 8 yue, 中国宪法案例教程, 清华大学法学院, 北京, 2002 年 8 月, unpublished, Beijing: August 2002). p. 29. See below note 63 on the WTO entry requirements.

<sup>17</sup> The citizen may also try to file an application with the local government or even the State Council. A lower authority may ask for Directives (*qingshi*, 请示) by the State Council concerning the legality of a particular regulation, especially in the context of an administrative reconsideration procedure.



*External administrative supervision.* It follows the logic of ‘ruling the officials not the people’ that the Chinese legal system envisages a form of external supervision by an authority ‘outside’ as well as in some ways above its state authorities. Indeed, it has its own Ministry of Supervision to perform this task.<sup>18</sup> Governmental ‘supervision’ of this external kind is exercised in nearly all state authorities, which have their own supervision departments. In his textbook on administrative law<sup>19</sup> Luo Haocai says that the entity exercising ‘administrative supervision’ can be part of the legislature, the administration’s supervisory branch, or the judicial organs - which comprehend the courts and procuracy.<sup>20</sup> State decisions are treated as potential failures of duty, rather than as potential rights violations or infringements.

The Ministry of Supervision was established in 1987 on the basis of the *Administrative Supervision Law*, to quote its own self-introduction, ‘to guarantee the implementation of government decrees, maintain administrative discipline, facilitate the building up of an honest and clean government, improve public administration and raise administrative efficiency and enhance law awareness of public servants in performing public duties...on behalf of the State Council.’<sup>21</sup> A similar institution had existed already from 1949 to 1959. Afterwards, the function of ‘administrative supervision’ was for some time performed by a

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<sup>18</sup> The Ministry of Supervision is called *Jianchabu* in Chinese. It shares one character with the word for ‘supervision’ used in the previous chapter discussing the difference between managing and regulating, and supervising.

<sup>19</sup> Luo Haocai, *ibid.* p. 19 f.

<sup>20</sup> It can also be what is termed the ‘subject of administration’ – the acting administrative authority. In this context the author distinguishes between *Xingzheng zhuti* (行政主体) and *xingzheng xiangduifang*, 行政相对方, that is, the addressee of an administrative decision or measure.

<sup>21</sup> *Introduction to the Ministry of Supervision of the People’s Republic of China/中华人民共和国监察部简入* (Zhonghua renmin gongheguo jianchabu jianru, bilingual, received in March 2003).

Communist Party committee. In 1987 the new Ministry was created. The disciplinary committee of the Communist Party at central and local levels, and the new Ministry and the bureaus and other offices under it, were from the outset closely connected; in fact, it appears that the majority of important members of the Supervisory Ministry and the bureaus under it are now also members of the Committees. The main difference is that the Party Committee will become active only toward party members, and the administrative authority in question only toward civil servants; but if a person is both, then both the committee and the administrative authority can become active.<sup>22</sup> The points of contact between the administrative supervision ministry and bureaus and the Communist Party are particularly numerous, not only in terms of personal identity of their staff. A glance at a current edition of the *Administrative Supervision Law and Complementary Provisions* shows that of the 27 'complementary provisions' it contains, seven were published jointly by the State Council and the Communist Party Central Committee, and two more were published jointly by the Ministry of Supervision and the (central) Communist Party Disciplinary Commission.<sup>23</sup>

The reach of the administrative supervision apparatus extends to the ministries at central level (directly under the State Council) and to all local governments and their members, and also to villagers' and residents' committees (Articles 15 and 16 *Administrative Supervision Law*). The methods and powers of

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<sup>22</sup> If the conduct of the official and party member in question has been sufficiently serious to constitute a crime, especially in the context of corruption, then what will usually happen is that the Party committee deals with him first (often by expelling him from the party), and then 'hands him over' to the state's crime or ('Law enforcement') authorities (in the case of suspicions against public officials, usually the People's Procuracies). For a typical example see Shen Jixuan (沈纪轩), 'Former Vice Governor of Anhui Province Wang Huaizhong deprived of party membership, handed over to the law enforcement authorities (*Anhui sheng yuanchengzhang Wang Huaizhong bei kaichu dangji, yisong sifa jiguan*, 安徽省原副省长王怀忠被开除党籍 移送司法机关, report of 29 September 2003 at [http://news.xinhuanet.com/legal/2003-09/29/content\\_1106674.htm](http://news.xinhuanet.com/legal/2003-09/29/content_1106674.htm).

<sup>23</sup> *Xingzheng jianchafa jiqi peitao guiding* (行政监察法及其配套规定, 中国法制出版社, Beijing: 2002).

the Ministry of Supervision and the bureaus under it are in the main inquisitorial, disciplinary and punitive; they go up to the power to deprive someone of his office, and confiscate property (Article 27). It can also make 'recommendations' to other administrative authorities for how to handle certain problems, and as a ministry, it can moreover make its own administrative regulations. To give an example of the methods of the Ministry of Supervision, Article 22 of the Administrative Supervision Law says that the supervisory authority may

'(...) order someone suspected of offending against administrative disciplinary rules to supply an explanation and clarification of the matter under investigation at a prescribed place and a prescribed time.'<sup>24</sup>

The Ministry and the authorities under it may make 'recommendations', or make 'supervisory recommendations or decisions'.<sup>25</sup> Again, despite some of the slogans employed in its self-introduction, the purpose of administrative supervision, is not mainly the protection of the rights of citizens. If in the course of administrative supervision, a remedy is afforded, this is as it were only by accident. The only reference of the *Administrative Supervision Law* to citizens' interests is in Article 47.

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<sup>24</sup> Significantly, it then continues, '...but not under any circumstances may it impose detention or a measure amounting to detention on that person.' Article 22 echoes, I think, a method of 'supervision' used by the Disciplinary Committees of the Communist Party towards members to be 'disciplined.' It requires persons to appear 'at a certain designated place and time, to answer questions' but it is in effect sometimes a detention measure. It is called by an almost identical expression, and abbreviated *shuanggui* (双规) – the 'two prescribed' – , and also consists in a prescription of a place (1) and time (2) at which a 'suspect' has to appear; sometimes to be locked up, for instance in a hotel room, and thus made to confess to misbehaviour or wrongdoing. Compare for an example taking place in Xiangfan in Hubei province, Huang Guangming (黄广明), 'Xiangfan Officialdom – a thunderstorm of anticorruption measures in Xiangfan, Hubei Province: over 70 officials collectively suspected of crimes (*Xiangfan guanchang – hubei sheng xiangfan fanfu fengbao: 70 yu ming guanyuan jiti she'an*, 襄樊官场 --- 湖北襄樊反腐风暴: 70 余名官员集体涉案)', *Southern Weekend*, 30 October 2003, at <http://www.nanfangdaily.com.cn/zm/20031030/xw/tb/200310300957.asp>. The currently popular so-called 'legal system literature' also contains in colour and detail very useful accounts, for instance in the popular novel by Lu Tianming (陆天明) *The Provincial Party Secretary* (*Shengwei shuji*, 省委书记, Beijing: 2002).

<sup>25</sup> See Articles 29 and 30.

‘Article 47. Where there is infringement upon and damage to the legitimate interests of citizens, legal persons, or other organizations as a result of the supervisory organ or personnel illegally exercising their powers, compensations shall be made in accordance with law.’

But the law does not even contain any requirement to the effect that citizens affected by misconduct should be notified of the outcome of the supervision procedure, so that they may decide for themselves whether to pursue responsibility of the administrative authority. Nor is there any provision for the procedural involvement of affected citizens in the course of supervision according to the *Supervision Law*, allowing the citizen to make his case.<sup>26</sup> How likely is it, really, that the administration will take it upon itself to discover what losses have occurred to individual citizens as a consequence of maladministration, and to ensure that such losses are compensated?

The fact that the Ministry of Supervision and the supervisory apparatus under it do exist and possess considerable power, is nevertheless important for the purpose of this study. It reflects a high degree of preoccupation with administrative correctness for its own sake,<sup>27</sup> unrelated to the purpose of rights protection. In this ‘unrelatedness’, as well as in illustrating the importance of the Communist Party in supervising state officials the procedure of administrative supervision offers an important insight into Chinese administration.

Another peculiarity closely related to the idea of supervision and of ‘correcting’ mistakes, is the predominance of ideas of punishment and discipline in the handling of administrative matters. It seems difficult to find a document of an administrative-regulatory nature in China, which does not threaten

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<sup>26</sup> Ordinary people with little education may be unlikely to turn to an authority under the Ministry of Supervision for help, among other things, because they simply do not know that these authorities exist.

<sup>27</sup> An expression often used is *jiuzheng cuowu* (纠正错误), ‘rectifying mistakes’.

‘disciplining measures’ or ‘severe punishment’ for some form of official misconduct or other, in one of its clauses.<sup>28</sup> The effect of all this threatened ‘severe’ disciplining and punishing is stifling. At the same time, these clauses sometimes read as though they *substituted*, or represented an alternative, to provisions for legal remedies, or even where such remedies are mentioned, as though they still somehow served to justify the entire piece of legislation, by exhibiting a high degree of general distrust: ‘we empower officials to impose restrictions and make demands on you, maybe in ways that contravene higher law...but we will punish our own officials if they abuse the powers we give them, or counteract our commands!’ Disciplinary clauses of this kind show concern with ensuring that things are done in a correct way, as well as confidence that mistakes can be righted by punishment, but while supervising itself in this way, the administrative apparatus appears, indeed, almost entirely concerned with itself. Perhaps this is particularly striking now that the Communist party state has all but abandoned the attempt to exercise ‘totalitarian’ control over but also provide total security to ordinary citizens (see Chapter Five). The current situation is perhaps more reminiscent of the principle mentioned in Chapter Two, that ‘the wise ruler controls the officials’ but leaves the people to themselves. Only in the present context it has lost its potentially benign meaning of tolerance and non-interference,<sup>29</sup> under in many ways radically changed conditions of life

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<sup>28</sup> This threat sometimes complements the threat to ordinary citizens of being subjected to ‘severe punishment’, too, if they offend against the commands. This is the subject matter of the *Administrative punishments law*.

<sup>29</sup> It is perhaps all the more interesting that modern Constitutionalism is by some interpreted as related to the ‘old’ idea of tolerance, *kuanshu* or *shu* (see discussion of *shu* in Chapter Three). This is done, for instance, by Cheng Jie in Cheng Jie (程洁), ‘Three philosophical sources of constitutionalism (*Lixian zhuyi de san zhong sixiang yuanliu*, 立宪主义的三种思想源流), at <http://www.gongfa.com/chengjielixianzhuyisanchaoliu.htm>. See also Chapter Ten.

for ordinary people, and when a troublingly large number of officials refuses to conform to the image of the caring 'father and mother official'.<sup>30</sup>

*Shangfang: Informal ways of achieving the reversal of decisions.* Partly due to the absence, for a long time, of a standardised procedure for stating *claims* towards public authorities, people affected by a wrongful measure often address themselves to various authorities – the (local) People's Congress, the (local) government or governmental department, the authority just superior to the one that decided on the measure – seeking some sort of intervention. This way of seeking redress, already mentioned in Chapter Two, is still popular. 'To receive supervision from the masses' or 'from society' is a term frequently used in China. Article three of the Constitution, for instance, mentions that the National People's Congress receives supervision from the people, while also supervising the administrative, the judiciary, and the procuracy. This structure is reproduced at the more local levels of government. Thus the responsibility of the highest state organ towards the people is emphasised. But in this context, the idea of 'supervision' allows for many kinds of different interpretation. As Luo Haocai writes,

'Citizens, legal persons or other organisations, representing a social force, can also exercise supervision over the administrative organ, by criticising or making suggestions, or by exposing its illegal conduct or reacting to [such conduct]. This does not necessarily set a specific procedure in motion; nor does it necessarily produce a particular legal result; it [therefore] does not count as legal [administrative] supervision, but is only a kind of supervision by society.'<sup>31</sup>

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<sup>30</sup> Not to claim that officials were any better in imperial times, of course.

<sup>31</sup> Luo Haocai, *ibid.* (note 6) at p. 19.

Historically speaking, the idea of 'supervision by society' may have preceded that of rights protection by courts.<sup>32</sup> 'Society' is most importantly allowed to 'supervise' through a petitioning mechanism. Governmental departments usually have an 'office for answering letters and receiving visitors', which I suggest calling letters and complaints offices.<sup>33</sup> These institutions can be said to have been created in accordance with Article 41 of the Chinese Constitution, which has already been cited.

In practice, it is not always possible to distinguish clearly between 'administrative reconsideration' and more informal ways of complaining.<sup>34</sup> Letters and complaints offices exist as part of all kinds of public authorities, including People's Congresses and, indeed, courts of law. The People's Congresses are particularly popular authorities for citizens to turn to: they are responsible, in principle, for the appointment to all major government posts, and they are also responsible, in principle, for budgetary matters, and according to the Constitution, they are themselves exercising a supervising function.

There is no doubt that the letters and complaints procedure can be successful.<sup>35</sup> But as a petitioning mechanism, the use of the institution of the complaints office or bureau is not without its own dangers. It is not surprising

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<sup>32</sup> The *Administrative Litigation Law* was only enacted in 1989.

<sup>33</sup> The Chinese expression for this is *Shouxin jiefang bangongshi* (收信接访办公室), or for short, *xinfangban* (信访办).

<sup>34</sup> To illustrate the flexible uses this procedure can be put to, but also to the varied success of the project of 'governing the officials', in a public lecture at Tsinghua University on the rural tax burden as an example to illustrate the relationship between the centre and the periphery on 26 September 2003 by Lü Xiaobo (吕晓波), he drew attention to the fact that letters and complaints were sometimes *invited* by the central government as a means of putting pressure on local governments, which did not carry out central laws.

<sup>35</sup> In an interview by *Bi-weekly Conversations* (半月談雜誌社) with the Head of the - generally low-profile - National Bureau for Letters and Complaints, Zhou Zhanshun (周佔順), he asserted that the complaints 'were reasonable' and required to be (and 'with the help of officials in the Communist Party,' could be) resolved, in 80 percent of all cases. 'National Minister for Letters and Complaints: 80% of complaints visits reasonable (*Guojia xinfangju juzhang: 80% shangfang you daoli*, 國家信訪局局長：80%上訪有道理)', available at [http://www7.chinesenewsnet.com/MainNews/SinoNews/Mainland/xhw\\_2003\\_11\\_20\\_00\\_25\\_52\\_838.html](http://www7.chinesenewsnet.com/MainNews/SinoNews/Mainland/xhw_2003_11_20_00_25_52_838.html).

that public authorities find the letters and complaints offices a sometimes troublesome institution. The state has reacted to this by imposing restrictions. At national level, there are firstly the State Council *Statutes on Receiving Letters and Visitors*, whose Article 22 mentions a technique for dealing with troublesome complainants, which we are already familiar with: namely, 'letters and complaints internment'.<sup>36</sup>

'If the complainant does not respect the rules set out in Articles 11 and 14 the letters and complaints authority may carry out criticism and education; if criticism and education have no effect, then the authority may request the local police to take the complainant away from the letters and complaints office and, in accordance with national regulations, to carry out internment and deportation, or to notify the complainant's area of residence [*sic*], his work unit or his family to come and take him home.'<sup>37</sup>

At lower levels of administrative legislation, there are further regulations detailing the situations in which complainants can be interned and deported.<sup>38</sup> For instance, Heilongjiang Province *Guidelines for Carrying out Internment and Deportation on Complainants* lists in its Article 7 among 'candidates' for internment and deportation 'those who after exhausting the methods of obtaining legal redress continue to make unreasonable claims and, while light criticism has no effect, continue to quarrel and are not prepared to stop [the dispute].' So, even after the abolition of the *Directives on Internment and Deportation of Vagrants*

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<sup>36</sup> *Xinfang shourong* (信访收容). The statutes are displayed on the wall of reception offices of some People's Courts, in the entrance areas of the courts, for instance.

<sup>37</sup> See State Council's 1995 *Statutes on Letters and Complaints* (*Guowuyuan xinfang tiaoli*, 国务院信访条例), edict no. 185 (1995). See also Wang Changfeng (王长风), 'The resolution of contradictions [conflicts, in society] rests on building up a healthy legal system (*Jiejue maodun zaiyu jianquan fazhi*, 解决矛盾在与健全法制)', in *Legal Services News* (法律服务时报) of 22 August 2003, at p. 4.

<sup>38</sup> For example, the rules made in 1988 by the Chinese Ministry of Health. Compare Jin Weifeng, (金伟峰, editor), *China's system of coercive administrative measures* (*Zhongguo xingzheng qiangzhi falü zhidu*, 中国行政强制法律制度, Beijing: 2002), at p. 203.



and Beggars, other, no more justified.<sup>39</sup> legislation on internment and deportation continues in force. Another form of internment or detention still in force is the 'internment for education system' – a system also applied, for instance, to prostitutes, according to different legislation.<sup>40</sup>

In October 2002, Ma Jiyun, a 61 year-old citizen of Heilongjiang province who had just obtained a second instance (final) court judgement of the Jianshan District Court of Shuangyashan City, applied for an order for the enforcement of the court's decision that an invalidity certificate must be issued. The judgement said that it was wrong of the local labour and social insurance bureaus not to issue her disabled son Wang Guishan with an invalidity certificate, after Wang Guishan had been severely injured by work colleagues in a brawl. Ma left the Jianshan District Court Building in the company of her friend and legal representative Sheng Qifang. Sheng Qifang had previously represented Ma Jiyun in a legal case about the bodily injury inflicted on her son (before another District Court of Shuangyashan). A few minutes away from the court, Ma Jiyun was arrested by officers of another, namely the Baoshan District Court of Shuangyashan City, and put into 'internment for education' for 75 days.<sup>41</sup> She came out of this internment partially paralysed in consequence of a stroke, requiring to be supported by a family member.<sup>42</sup> There was a reasoned written statement detailing the grounds of the internment measure initiated by the

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<sup>39</sup> The considerations regarding the Constitution and *Legislation Law* set out in Chapter Five apply here, too.

<sup>40</sup> The Chinese term for this is *shourong jiaoyu* (收容教育).

<sup>41</sup> A series of Articles in *Legal Services News* (法律服务时报) of 22 August 2003 by Sheng Xueyou (盛学友) and Wang Changfeng (王长风) reports on this case.

<sup>42</sup> There is a later, further report of this case in *Southern Weekend*. Sheng Xueyou (盛学友), 'Two citizens cast doubt on "letters and complaints internment" (*Liangge gongmin zhiyi "xinfang shourong"*, 两公民质疑“信访收容”)' *Southern Weekend* of 9 October 2003, at <http://www.nanfangdaily.com.cn/zm/20031009/xw/fz/200310090795.asp>. This Article shows a picture of Ma Jiyun, supporting herself on a stick.

Baoshan District Court of Shuangyashan City, which relied chiefly on the statement that Ma had tried at various times to speak to judges, and had in particular tried to obstruct the car of the President of the Supreme People's Court Xiao Yang for this purpose, when Xiao Yang was visiting the Heilongjiang High Court.<sup>43</sup>

'In the matter of the bodily injury inflicted on her son Wang Guishan, Ma Jiyun had for a period of eight years been making complaints visits with authorities at exceedingly high levels...<sup>44</sup> but the reasons stated in her applications for judicial supervision<sup>45</sup> and his complaints letters could not be established, as had been ascertained by courts at four different levels...for several years Ma Jiyun incessantly made trips to Beijing and to the provincial capital to make complaints, and this conduct must be classified as making complaints without reasons. Several times of persuading and educating her had no effect; she persisted in querulant complaints visits, and in the end even made a plan of going to Beijing to make complaints visits during the time of [a plenary session of] the 'Sixteenth' [National Congress of the Communist Party of China].<sup>46</sup>

The Baoshan District Court's suggestion to impose 'internment for education' of three months' duration was passed on to the Intermediate Court of Shuangyashan City (the court one level higher up), then to the Letters and Complaints Office of Shuangyashan City, and to the mayor of Shuangyashan City Zhang Wenxue, all of which signalled their approval of the measure. It was then carried out by the Shuangyashan police. According to the report Ma Jiyun had just been doing nothing more offensive than apply for a court order to enforce a legally effective court judgement, as her friend pointed out. Sheng Qifang also emphasised that there was no evidence for the alleged incident with Xiao Yang's car; and as for the idea of going to Beijing during the Sixteenth Plenary Session, he pointed out

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<sup>43</sup> See Article by Sheng Xueyou (盛学友) in *Legal Services News* (法律服务时报) of 22 August 2003 at p.1. The author quotes a friend of Ma's pointing out that these allegations were not supported by any evidence.

<sup>44</sup> The Chinese expression for this is *yueji shangfang* (越级上访).

<sup>45</sup> The expression used is *shensu* (申诉). I discuss this procedure in chapter 7.

<sup>46</sup> *Ibid.* p. 1.

that the Baoshan District Court was merely alleging an intention on the part of Ma Jiyun.

Whether or not detaining Ma Jiyun as an ‘educational’ measure in accordance with ‘administrative punishment detention’ (according to Article eight subsection six of the *Administrative Punishment Law*) might have been possible, it was ‘letters and complaints’ detention, not educational detention that was imposed here.<sup>47</sup> Nor is there any reference to administrative punishment to be found in the Heilongjiang *Guidelines for Carrying out Internment and Deportation on Complainants*, nor is it clear what (other) law Ma could originally have offended against.<sup>48</sup>

Ma Jiyun and Sheng Qifang lost their confidence both in the power or willingness of the courts to protect their legal rights, and in the letters and complaints procedure. They filed two ‘suggestions’ with the Heilongjiang People’s Congress’ Standing Committee and with the Heilongjiang government, to the effect that the above quoted *Guidelines* should be abolished as unconstitutional, because they contravene Article 37 of the Constitution and infringe Chinese citizens’ ‘right to sue.’<sup>49</sup> The suggestion letter to the Heilongjiang government, which dates of 18 August 2003 was reprinted in the

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<sup>47</sup> The deciding authority for administrative punishment would have been a city government, for instance, and the authority carrying out this measure the police, see Article 16. Moreover Article three of the *Administrative Punishment Law* says that administrative punishments are invalid without legal basis or without following legal proceedings.

<sup>48</sup> One might construe a legal obligation of heeding ‘persuasive’ and educational admonitions by letters and complaints offices from the fact that letters and complaints offices should try to persuade and educate unreasonable complainants. But again we encounter the limits of the idea of legal obligation. There can be no obligation to *be* persuaded or to be convinced of anything. In an interview by Hou Xiao (侯晓) with Fang Jiamin in *Legal Services News* (法律服务时报) of 22 August 2003 at page 13 he says that complainants have ‘a [legal] duty’ to comply with the procedure of letters and complaints visits, and not to persist in making ‘too high or unreasonable claims.’

<sup>49</sup> *Suquan* (诉权). See for the text of the petition, ‘Suggestion letter petitioning for the abolition of Heilongjiang Province’s letters and complaints internment and deportation regulation (*Qingqiu feizhi Heilongjiang sheng xinfang shourong qiansong gongzuo fagui jianyi shu*, 请求废止黑龙江省信访收容遣送工作法规建议书)’, reprinted in *Legal Services News* (法律服务时报) of 22 August 2003 at p. 4. Not information is available on the outcome of this petition.

newspaper reporting on the story, alleges some further details. Its last sentence also conveys a message of urgency, anger, and uncompromising request.

‘On 31 July 1991, a mine accident happened on the fourth platform of Shuangyashan Coal mine.<sup>50</sup> The relevant authority issued a concluding report of a natural disaster. Sheng Qifang, Ma Jiyun and others reported on this falsification and suppression of facts and were in the end successful, for the mentioned accident was classified as an accident [to which attached] grave responsibility and the people responsible for it were convicted according to criminal law. But Sheng Qifang was put into ‘interment for education’ for 68 days as a consequence and had to wear 48 pound heavy fetters round his feet.<sup>51</sup>

[Also,] Ma Jiyun’s son<sup>52</sup> Wang Guishan was intentionally attacked with a knife by his fellow workers and room-mates, and heavily injured and left disabled. The Jianshan District Court of Shuangyashan has issued a judgement regarding the rejection of Wang Guishan’s application for a certificate of having suffered a work injury by the Shuangyashan Labour and Social Security Bureaus, deciding the rejection was illegal and ordering the defendants to make another specific administrative act. After the judgement took legal effect, it was in accordance with procedural law for Ma Jiyun to apply for a court order to enforce it. When Ma Jiyun went to the Jianshan District Court on 24 October 2002 to ask for an enforcement order regarding this judgement against the Labour and Social Security Bureau, the Baoshan District Court, which was handling another litigation of Ma Jiyun’s, imposed ‘educational internment’ on her. After 75 days, because she had become [partly] paralysed,<sup>53</sup> Ma Jiyun was ‘released prematurely’.<sup>54</sup> In accordance with law, the *guidelines* ought to be abolished immediately. This should not be put off any further.’<sup>55</sup>

The ‘letters and complaints’ practice also brings out some special problems with informal complaint procedures. There may indeed be querulant complainants, their requests may be unreasonable, and they may hamper the work of public authorities, but it is difficult to deal with such problems. The very informality of the procedure for letters and complaints visits, the very comprehensiveness of the

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<sup>50</sup> The precise location of the accident is given as *Shuangyashan kuangwuju si fangtai* (双鸭山矿务局四方台).

<sup>51</sup> *Jiaoliao* (脚镣).

<sup>52</sup> *Changzi* (长子).

<sup>53</sup> The *Nanfang Zhoumo* Article (note 39) details that according to the medical record she suffered from an obstruction of cerebral blood vessels, which combined with prolonged wrong treatment brought on a partial paralysis (a stroke).

<sup>54</sup> 释放, an expression also used in the context of prison sentences. *Ibid.*, p. 4.

<sup>55</sup> Urgency is conveyed here by using the four-character phrase *ke bu rong huan* (刻不容缓).

rights of complainants and of the obligations of 'receiving' state authorities.<sup>56</sup> and the lack of a forensic mechanism for sorting out factual and legal questions arising from the complaints made, creates in-built difficulties. State authorities are burdened with an ill-defined, almost unlimited 'responsibility' - in this case not for allocating citizens but for dealing with dissatisfied citizens. In response, they grasp a very comprehensive kind of power over these citizens' persons, and resort to abusing this power. Notably, Ma Jiyun and Sheng Qifang only attacked the constitutionality of the provincial *Guidelines* but not of the national level State Council *Letters and Complaints Visits Statutes*.<sup>57</sup> Ma Jiyun's case gives one an inkling of how many unconstitutional mechanisms for limiting the personal freedom of citizens there still are at state authorities' disposal. Various recent examples of *shangfang* activities are less complex (the way they are reported) but more alarming. As already mentioned, there is an increasing number of suicidal remonstrance activities as well as activities euphemistically called 'collective remonstrance' – meaning demonstrations.<sup>58</sup> These occurrences are also reported

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<sup>56</sup> In the introduction to the above mentioned interview with Fang Jiamin, the respective rights and obligations are listed.

<sup>57</sup> The later Article in *Nanfang Zhoumo* (note 39) on the same case reports on the journalist's phone call made on 23 September 2003 to the 'letters and complaints' office of the provincial government, where he is told to contact the provincial government 'legal affairs' office, where he is told that the letter he is asking about has not yet been received by this office. The legal affairs office employee volunteers the information that 'it would be very difficult to abolish the Heilongjiang province guidelines, while the State Council level statutes on complainants' internment are still in force.' *Ibid* .<http://www.nanfangdaily.com.cn/zm/20031009/xw/fz/200310090795.asp>.

<sup>58</sup> See for instance Zhou Yesheng, 'On appropriately handling "collective complaints visits" (*Tuoshan chuli "jitifang" de celue*, 妥善处理“集体访”的策略)' at *Zhengyiwang*, 26 March 2003, at <http://www.chinacourt.org/public/detail.php?id=109099>. A report in *Secret China* (看中国报道) says that Beijing government issued a 'regulation' in March 2003 prohibiting the complainants to use scrolls and to shout slogans, in order to avoid 'disturbance of peace and stability.' 'Beijing issues edict to prohibit masses come to Beijing from shouting slogans and carrying scrolls when reporting grievances (*Beijing banling: jinzhi fujing minzhong shenyuan shi han kouhao, la hengfu*, 北京颁令：禁止赴京民众申冤时喊口号、拉横幅', 3 April 2004,, at <http://www.secrechina.com/news/Articles/4/4/3/62766.html>.

and commented on publicly.<sup>59</sup> Coercive measures are taken against demonstrators: they may be charged with the crime of causing public disturbances, or with breaking local regulations, for instance.<sup>60</sup>

Dissatisfied citizens do not only 'pay visits' to complain; they also write letters.<sup>61</sup> Other reports have appeared on mass petitions submitted to governments or People's Congresses. In such cases, the focus of citizens sometimes changes from a particular complaint of maladministration to a request for the resignation of officials, according to some reports.<sup>62</sup> Indeed, in 2004 the Communist Party of Sichuan Province was reported to have issued a regulation on the obligation to 'take the blame and resign,' a step which caused a flurry of discussions, not least over the voluntariness of such 'resignations.'<sup>63</sup> Even in extreme situations there

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<sup>59</sup> For a discussion of a case occurring at Tiananmen in September 2003, see Li Hongjun (李红军), 'Background of the self-immolation of a complainant (*Shangfangzhe zhimie de beihou*, 上访者自焚的背后)', 9 October 2003 at <http://www.nanfangdaily.com.cn/zm/20031009/xw/zy/200310090797.asp>.

<sup>60</sup> See already in Chapter Two. On 21 October 2003 *Xinhua* reproduced an Article of the *Morning Post* (新闻晨报) reporting the arrest of seven Shanghai citizens come to the capital. 'Shanghai has detained seven criminal suspects for entering Beijing and causing public disturbance under the name of complaint visits (*Shanghai xingshi juliu qi ming shexian yi jin jing shangfang wei ming juzhong zishizhe*, 上海刑事拘留 7 名涉嫌以进京上访为名聚众滋事者)' 21 October 2003, available at [http://news.xinhuanet.com/legal/2003-10/21/content\\_1133521.htm](http://news.xinhuanet.com/legal/2003-10/21/content_1133521.htm). See also on a blockade of Beijing's fourth ring road and consequent arrests on suspicion of disturbing the public order, 'Instigating the masses to block the Fourth Ring Road – two defendants accused in Beijing (*Shandong qunzhong fengdu sihuanlu – beijing liang ming beiguoren bei tiqi gongsu*, 煽动群众封堵四环路 京城两名被告人被提起公诉)', 15 May 2004 at *Xinhua*, [http://news.xinhuanet.com/legal/2004-05/14/content\\_1469086.htm](http://news.xinhuanet.com/legal/2004-05/14/content_1469086.htm).

<sup>61</sup> See a report on petitioners being locked up so as to prevent them from demonstrating, and of citizens being put in *shuanggui* detention for organising petitions. Yu Meisun (俞梅荪), 'Tangshan Police investigates all the peasants who signed the "Ten Thousand People's Memorandum" - every person has put themselves in danger (*Tangshan jingfang zhuicha "wan ren zhe" qianming nongmin, ren ren ziwei*, 唐山警方追查「万人折」签名农民人人自危)', 14 April 2004 at <http://www.secretchina.com/news/Articles/4/4/14/63394.html>.

<sup>62</sup> See, for instance, the *Secret China* report (看中国报道), 'Xinhua and Renminwang unite – an attack spearheaded against Jiang Zemin (*Qingqing: Xinhua renminwang lianshou, maotou zhixiang Jiang Zemin*, 青晴: 新华网人民网联手 矛头指向江泽民)' 21 April 2004, at <http://www.secretchina.com/news/Articles/4/4/21/63810.html>.

<sup>63</sup> See Qin Chuan, "'Take Blame and Resign' More Popular', *China Daily* 8 March 2004, at [http://www.chinadaily.com.cn/english/doc/2004-03/08/content\\_312764.htm](http://www.chinadaily.com.cn/english/doc/2004-03/08/content_312764.htm), Lian Yue (连岳), "'Taking the blame and resigning" is of course not voluntary (引咎辞职本就不是自愿的)', in *Southern Weekend* (南方周末) of 6 May 2004, Zheng Zhi (郑致), 'Let us clearly explain "Taking the blame and resigning" article by article (让“引咎辞职”条条兑现)', 18 May 2004, available at [http://news.xinhuanet.com/comments/2004-05/18/content\\_1475132.htm](http://news.xinhuanet.com/comments/2004-05/18/content_1475132.htm)

is a perceived value in people's acting from their true insight into having done wrong.

*Administrative reconsideration.* Whether one must or should exercise a right, is also a question of right and wrong; but once one has engaged in rights-centred discourse, this decision can only be taken by the person the exercise of whose rights is at issue. How well administrative litigation serves the purpose of individual rights protection, is very largely a matter of the specific procedures available.

The administrative reconsideration procedure is one clearly designed for 'independent' review of administrative decisions, although the review process remains within the administration itself. It gives citizens a right to challenge a specific measure taken against them, *and* to receive an answer to their challenge.<sup>64</sup> It also gives the administration a chance to review its own decision; and it gives the complainant a chance to get a new decision relatively easily, without going through a complicated court procedure. The standard of scrutiny used in administrative reconsideration extends beyond looking at whether an administrative act was legal; it also considers whether it has been 'reasonable', in terms, say, of administrative goals.<sup>65</sup> As already mentioned, administrative

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<sup>64</sup> In that sense, administrative reconsideration and litigation (See Chapter Seven) are the procedures with the best potential to fulfill China's obligations after its accession to the WTO. Article X of the General Agreement on Tariffs and Trade (hereafter GATT) demands that Members should 'maintain or institute judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.' These procedures therefore tend to be the ones on which Western observers concentrate their attention. On judicial review – which administrative reconsideration can lead up to – see also part D of the Protocol on The Accession of The People's Republic Of China [to the WTO], 10 November 2001, available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc>.

<sup>65</sup> *Hefaxing* (合法性) and *helixing* (合理性). By contrast, in Chinese terms, administrative litigation allows review only as to 'legality' but not as to 'reasonableness' (appropriateness). Again, this is reminiscent of German law but the expression for the scope of scrutiny used there

reconsideration can generally be requested only regarding 'concrete' administrative acts.<sup>66</sup>

The requirements of 'legality' and 'reasonableness' should be considered carefully. Can something that is legal not be reasonable? For example, Article 54 of the Chinese *Administrative Litigation Law* lists as possible grounds of the illegality of an administrative act that it is *ultra vires*, or has abused official power. Of course, power abuse is illegal as well as unreasonable: or at least if these requirements are not considered as disjunct but instead as connected, then there is room for legal interpretation to consider rights conformity, for instance, as a *requirement* of 'reasonableness'. This is done in jurisdictions where a proportionality test is used to assess the impact of administrative decisions on constitutional rights, for instance. Rejecting such a connection, by contrast, means that the legality of a decision could be reviewed quite independently of its reasonableness, and can close the idea of legality off against substantive rights-related requirements.<sup>67</sup>

As mentioned before, the administration has three options for deciding a reconsideration application: to set a time limit for performance of the administration's obligation to act; to annul a specific administrative act, alter it or declare it invalid; and to reject the application for reconsideration. But these options only describe the forms which decisions in administrative reconsideration

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for administrative as opposed to judicial review would be 'appropriateness', in Chinese probably *tuodangxing* (妥当性). – The duality of *hefa* and *heli* here should also remind us of the discussion in Chapter Four.

<sup>66</sup> The point of definition in this area of legal, political and moral concern has to be the appeal of its practical application and therefore a comparison may be useful: in German law, the distinction is used mainly because different tests are used for assessing the legality (including constitutionality) of specific and 'abstract' administrative acts – administrative ordinances or regulations. Compare e.g. Article 80 (1) of the German *Basic Law*.

<sup>67</sup> This touches on the discussion about the nature of 'judicial discretion', and the question if there can be 'gaps' in the law. (The view that there can be seems to be as popular in China, as elsewhere.)



can take. The way these decisions are reached, and the substantive considerations going into them, are not further defined. It appears that mediation is used not infrequently. The 1999 *Administrative Reconsideration Law* contained a provision explicitly prohibiting the use of mediation, but in the current law, this prohibition has been dropped out.<sup>68</sup> The use of mediation in administrative reconsideration procedure is problematic, given the power imbalance frequently characterising the relationship between citizens and the administration. However, an efficient administrative litigation procedure may be enough to level out the imbalance. In this context it is worth noting that Chinese scholars have recently put forth an argument for widening and acknowledging rather than rejecting mediation in administrative reconsideration and litigation procedure.<sup>69</sup> Administrative reconsideration can include an application for damages according to the *Administrative Compensation Law*.<sup>70</sup> In terms of their scope, decisions are like a court decision. The institution of administrative compensation can play an important role in empowering citizens to sue public authorities, because loss of money is a substantive threat, even against political power. It is not clear, however, how ready citizens are to claim compensation from government.<sup>71</sup>

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<sup>68</sup> See Wang Xixin (王锡锌), 'Principles, Agreement and [political] governance – a study of the possibility and appropriateness of use of ADR in the administrative process (*Guize, heyi yu zhili – xingzheng guochengzhong shiyong ADR de kenengxing yu todangxing yanjiu*, 规则、合意与治理——行政过程中适用 ADR 的可能性与妥当性研究)' at [http://www.chinalawedu.com/news/2004\\_4/10/1455281654.htm](http://www.chinalawedu.com/news/2004_4/10/1455281654.htm) The standard translation for *zhili* is 'to rule' or 'administer a state', but note it contains the *li* which can variously be translated as 'reason' or as 'right, as an abstract principle.' (See chapter 4.)

<sup>69</sup> *Ibid.*

<sup>70</sup> Article 9. The claim for compensation can also be made outside a reconsideration procedure, or during administrative litigation. But note it may be difficult to get to the stage of administrative litigation, for instance if the administrative authority remains inactive until the time limit for filing a court case has elapsed (see below).

<sup>71</sup> One report mentions only 35 handled cases of administrative compensation in [one of] Beijing's two Intermediate courts, in a period of ten years – not much in a city of now fourteen million. Guo Zhixia (郭志霞), 'Ten years after promulgation of the *State Compensation Law*, 35 cases concluded in Beijing (*Guojia peichangfa banbu shinian, Beijing shenjie 35 jian guojia peichang*, 国家赔偿法颁布十年 北京审结 35 件国家赔偿)', *Xinhua*wang, 11 May 2004, at [http://news.xinhuanet.com/legal/2004-05/11/content\\_1461641.htm](http://news.xinhuanet.com/legal/2004-05/11/content_1461641.htm)

If a citizen's appeal to the administrative body which made a decision, or its superior, for reconsideration does not result in relief or redress, then the fact that such an appeal is required before the citizen may sue the administration in court,<sup>72</sup> may turn into a positive obstacle to rights protection. One of the remaining problems with the *Administrative Reconsideration Law* in China is that it imposes statutory time limits for opposing a reconsideration decision in the course of court litigation. To provide time limitations on challenges to administrative acts can be justified by public interest in the security of past decisions. But for time limitations to be justified, there has to be 'fair warning'. An individual affected by an administrative decision or measure must be apprised of his procedural rights, including the right to apply for reconsideration and to sue. In China, the *Administrative Litigation Law* does not state a clear requirement that the citizen affected be advised about the statutory time limit. Surprisingly, there is a decision by the Supreme People's Court, included in a collection of *Exemplary decisions in administrative litigation*, that if an application for administrative reconsideration is not answered at all, this must be regarded as an answer to the effect that the original administrative act is upheld.<sup>73</sup>

On the other hand, the administrative review procedure allows for an extension of the scope of review of administrative decisions. It allows for review

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<sup>72</sup>The expression for this requirement is *qianzhi chengxu* (前置程序).

<sup>73</sup> As a consequence in this case, the applicant (plaintiff) had lost his right to litigate against the 'upheld' administrative decision, due to time lapse. See 'When an administrative reconsideration authority does not decide on a request within the time limit, it should be regarded as having upheld the original concrete administrative act', (*Fuyi jiguan yuqi dui fuyi shenqing buzuo caijue ying shiwei weichi yuan juti xingzheng xingwei*, 复议机关逾期对复议申请不作裁决应视为维持原具体行政行为), in Jiang Yong (蒋勇, editor) *Analysis of Exemplary Decisions* (Beijing: 2000) at p. 67.

of 'abstract' administrative acts to be subjected to review. Article seven of the *Administrative Reconsideration Law* states that

'Article 7. When a citizen, a legal person or other organisation at the time of applying for administrative reconsideration of a specific act considers that a norm (*guiding*) of one of the kinds listed below, on which the administrative act relies, is illegal, he can also apply for an examination of said regulations with the administrative reconsideration authority.

- (1) Norms of the ministries under the State Council;
- (2) Norms made by local governments above prefecture (*xian*)<sup>74</sup> level and their departments;
- (3) County (*xiang*, *zhen*)<sup>75</sup> level government norms.'

So within narrow limits, some 'red-headed documents' can now be subjected to administrative review as part of the administrative reconsideration procedure. This provision was only introduced in 1999 and welcomed by many scholars as a breakthrough. Insofar as only the review of documents with normative character by same level or higher level administrative authorities is concerned, the main change consists 'merely' in the fact that such review can occur at the initiative and request of an individual citizen, and that the administrative authority has an obligation to make a reasoned decision (Article 45 *Administrative Reconsideration Law*). If moreover the requirement for an 'abstract administrative act review' can be brought up within a court procedure,<sup>76</sup> the breakthrough is even much greater. Article 53 of the *Administrative Litigation Law*, however, could be read as taking the competence of actually examining the legality of 'abstract' administrative acts' back out of the hands of courts again, by prescribing that when they come across a 'norm' (*guiding*) that is 'not

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<sup>74</sup> *Xian* (县).

<sup>75</sup> *Xiang* (乡), *Zhen* (镇).

<sup>76</sup> As argued by Wang Zhenmin (王振民) in an LL.M. class on Constitutional Law at Tsinghua University Law School on 9 October 2003.

consistent<sup>77</sup> with other ‘administrative’ legislation, they have to submit this question to the State Council for decision.<sup>78</sup> This issue is discussed in greater depth in Chapter Seven.

Beyond the provision in Article seven of the *Administrative Reconsideration Law*, the State Council (Legal Affairs Office) and the corresponding Legal Affairs Offices at provincial government level have even further-reaching rights of reviewing administrative legislation, according to Article 89, subsection 13 and 14 of the Chinese Constitution (for the State Council). These rights, however, are not reciprocated in any way by the power of the courts *even* just to submit questions about the legality of such higher-ranking administrative norms to the State Council. (An exception is the Supreme People’s Court’s right to submit such questions to the Standing Committee of the NPC, to be discussed below). By enhancing the power of administrative authorities while leaving the power of the courts limited, the courts are weakened, as in the case of Ma Jiyun above, who could not have challenged the legality – constitutionality – of the *Guidelines* concerning complainants’ internment in court.

The review process generally envisaged, by contrast, leads from administrative reconsideration to review of an administrative decision in court, as the following example shows.<sup>79</sup> One day in May 2000, eighty-year-old Mr Yuan from Shuichuan in Chongqing, who had been living with his children in

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<sup>77</sup> Here this translation is preferable over the more literal (or more common) translation of *yizhi* — 致 as ‘identical’.

<sup>78</sup> Compare Article 89 (13) of the Constitution.

<sup>79</sup> Xie Xiaoguo (谢孝国), ‘An eighty-year-old interned in Shenzhen gets some words of apology after two years of troublesome litigation (*Baxun laoren Shenzhen bei shourong, liangnian guansi feixin tao shuofa*, 八旬老人深圳被收容 两年官司费心讨说法)’, *21 Century Herald Tribune*, 25 June 2003, at <http://news.21cn.com/guangdong/tq/2003-06-25/1088852.html>. It is not an illustration of the ‘unimportance’ or infrequency of such cases, that even an extended search for court and/or administrative reconsideration cases in the context of internment and deportation led only to one court judgement reprinted in several anthologies (see below Chapter Seven), and a handful of cases reported in several newspapers (see Chapter Five). The probable reason for the scarcity of reports is that these cases are, or were, ‘too sensitive’.

Shenzhen for over fourteen years, went for a stroll round the block. He had the bad luck of walking into the arms of officers of the Shenzhen police just on the look-out for 'three no – people', and since he was not carrying any documents with him, he was arrested, reportedly despite his protests that he was living with his children and had only forgotten his papers, and driven to the 'Yinhu Shenzhen internment and deportation station'. There he spent a day and a night, before being taken further to the Shanwei Haifeng station. (It is not reported if any fee was collected from him on his leaving the first station.) This second station did not actually intern him, because after questioning him they thought it indeed likely that he had family in Shenzhen, and had somehow been mistakenly or unnecessarily<sup>80</sup> arrested and interned. They found he was still carrying sixty Yuan with him and thought he might as well pay for his own train-fare back home, but they rented him a tricycle to take him to the railway station, and gave him a slip of paper saying where he was supposed to go. On arriving at the station, the old man in his confusion lost himself in the streets, but he was taken up by 'a kind-hearted person' who finally put him on the right train. In the meantime, Yuan Wen's children had tried the police, hospitals and internment and deportation stations to find any trace of him, but in vain. At the first station, it was later discovered, the eighty-year-old Mr Yuan had 'accidentally' been registered as 'thirty years old'. 'You don't think we'd intern an eighty-year-old as a thirty-year-old?', the staff at the Yinhu Shenzhen station said to the daughter-in-law. They had better go to the Haifeng station, he said, and if the old man was not to be found there, well, then there was nothing else to do. At the Haifeng station, too, enquiries were made in vain. As a consequence, Mr Yuan's ordeal continued

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<sup>80</sup> The legality of the internment measure was of course later disputed.

for several more hours, and he was exposed to a considerable risk of getting lost altogether.

Mr Yuan's family were outraged. They reacted to what they felt to have been an injustice – interning an eighty year old man who has merely forgotten his papers, apparently without listening to his statement of the facts, and making it impossible for his relatives to trace him.

'...Yuan Wen and his children applied to various administrative departments, and eventually, with the intervention of the Shenzhen People's Congress and the Letters and Complaints Office of the Shenzhen government, they got some 'words' [of apology or explanation] from the Civil Affairs Department of Shenzhen, the authority in charge of the internment and deportation stations.<sup>81</sup>

Mr Yuan's family's application to the Bureau for Civil Affairs as the administrative authority just above the two internment and deportation stations here involved was an application for 'administrative reconsideration', but insofar as the family also addressed themselves to the local People's Congress etc., they used informal channels to influence the decision. This appears to be by no means an untypical 'modification' of the administrative reconsideration procedure.

'...Eventually, the administrative authority above the internment and deportation station came up with some 'words'. On 18 July 2000, the answer given by the Shenzhen City Civil Affairs Bureau to the Office of the Shenzhen City People's Congress [!] was: The City's Internment and deportation station's internment and deportation of Yuan Wen was in accordance with the relevant legal provisions on internment and deportation; the way the station carried out internment and deportation on Yuan Wen had also followed the proper [relevant] order/path; currently, the relevant state regulations on internment and deportation had not made any restriction regarding the age of the targets/objects of internment and deportation and hence there was nothing wrong about internment and deportation of an eighty-year-old. When he entered the internment of

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<sup>81</sup> *Ibid.* (note 78). The expression I have translated as 'getting some words', *gei le ge shuofa* (给了个说法), was made famous by Zhang Yimou's film *The story of Qiu Ju* (*Qiu Ju da guansi*, 秋菊打官司). See also in Chapter 2.

Yuan Wen in the computer register, the staff member of the station had difficulties to tell an '8' from a '3' because the police officer's form filled in by hand was written unclearly, and this was how Yuan Wen came to be wrongly registered as 30 instead of 80 years old. As a consequence, the family of Yuan Wen when searching for him had difficulties discovering his whereabouts, due to his age having been wrongly registered. This was brought about by a lapse of sense of duty on the part of the staff member of the station.

Eventually the Civil Affairs Bureau decided: the management<sup>82</sup> of the station and the involved staff members should proffer comforting words<sup>83</sup> towards Yuan Wen, and express their regrets<sup>84</sup> towards his family. For losses arising to them from absence from work, food and traffic expenditure the station should made an appropriate 'compensation' payment, and the station's work style should undergo a correction.<sup>85</sup>

But then the family of Mr Yuan discovered that the Shenzhen internment and deportation station refused to pay any damages (and it appears they did not apologise, either). It is not clear who decided that no payment should be made and why; whether perhaps the Civil Affairs Bureau changed their mind or whether it could not exercise sufficient pressure on the station under its control. In a larger context, however, it should be observed that an obvious disadvantage of administrative review is that one's case does not leave the realm of administration; there is a danger, therefore, that the procedure and outcome of reconsideration will be neither as impartial nor as efficient as a court procedure can be. Note in this context Article 32 of the Administrative Litigation Law.

'Article 32. The respondent<sup>86</sup> [to the administrative reconsideration application] shall<sup>87</sup> comply with the administrative reconsideration decision. If the respondent does not comply with it or delays compliance without adequate reason, then the administrative reconsideration

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<sup>82</sup> *Lingdao* (领导).

<sup>83</sup> *Weiwen* (慰问).

<sup>84</sup> *Qianyi* (歉意).

<sup>85</sup> *Ibid* (note 78 ).

<sup>86</sup> *I.e.* the administrative authority that originally became active, compare Article ten (3).

<sup>87</sup> *Yingdang* (应当).

authority<sup>88</sup> or its superior administrative authority shall order the respondent to comply, setting a time limit for compliance.'

There is no further provision for enforcement of administrative reconsideration decisions and not even an indication of the procedure by which citizens can demand an order to comply, or indicating the consequences of non-compliance for the administrative authority. But the administrative reconsideration procedure can be – and in this case was – followed by a court procedure. I will turn again to Mr. Yuan as I go on to discuss rights protection through adjudication in China in the following chapter.

The fourth chapter, discussing mediation, explored the implications of the proposition that having rights was not conclusive of what one should do, and the fifth chapter discussed some indispensable requirements for legislation to respect legal rights. This chapter turned attention the other way from mediation, and illustrated how irreplaceable, as well as indispensable, rights protection is especially in situations of challenging a state authority. Neither petitions nor applications for administrative reconsideration can supply the full rights protection desirable, because the public authority in charge of handling petitions or reconsideration applications is too close, on the whole, to the authority whose decision may have infringed a citizen's rights. Rights protection requires a certain procedure, but that does not mean that there are no rights where no such procedures are in place; rather, people's rights are not protected in such cases.

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<sup>88</sup> See Articles twelve to fifteen on whom to apply to for administrative reconsideration. In some cases, the administrative reconsideration authority is the authority that originally became active; in these cases, the authority to order compliance even more evidently has to be its superior.



## Chapter Seven Chinese court practice: a shift in perspective

To appeal to government or even a People's Congress is a common way of reacting to maladministration and injustice among Chinese citizens. To go to court is not yet, despite changes over the past years. Part of the reasons for this is that courts appear as dependent organs 'under' the government, rather than as independent institutions to check governmental power. But there are further reasons; one of them being, surely, that appeals in the form of 'letters and complaints visits' can be successful: not least because the authority appealed to may have real power or influence. The previous chapter essentially described a two-party relationship between individual citizen and state authorities at various levels and in different branches – including the courts themselves, as in the case of Ma Jiyun, who sought to get help in the matter of her disabled son. Even where the intervention of a 'third' party such as a People's Congress member is sought, there is an assumption that such intervention will take the form of an appeal to working relationships, or the form of a command based on political hierarchy: an assumption of unity between the state authorities involved. This chapter turns to litigation in court, as a procedure where the court is an impartial third institution, or should be.

The argument moves from an interpretive account of the purpose of criminal adjudication to discussion of how constitutional rights matter to litigation – both administrative and civil<sup>1</sup> - in China to date. This requires a position in the debate about the so-called 'judicialisation of the Constitution'.

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<sup>1</sup> Or that is, civil as would-be administrative litigation, where the defendant is a state authority but is sued in a civil litigation procedure, to circumvent obstacles posed by the *Administrative Litigation Law* (see below).

This discussion is about how far judges can take direct recourse to constitutional provisions, especially rights guarantees, in the process of deciding cases, and what they should do when faced with law they think unconstitutional. The vehemence with which this debate is being led at the moment is, it seems, an expression of how much it goes to the heart of traditional Chinese adjudication and mediation. Therefore the argument here has to connect to observations made previously: allowing discourse about fundamental rights requires a mode of discussion in which one's most principled political, legal and moral convictions will have to be given sharp and unequivocal expression. In such adjudication processes, sustained dissensus about what should be done in any particular case can be expected at the end of a court procedure, which is of course expected to decide ('settle') the matter at hand. Certainly, constitutional rights cases are not generally settled by a sincere and genuine apology from one party to the other, or even by a mere show of unanimity or deference to the court's view. Deference is shown only to the court's decision. These features appear to make cases of fundamental rights adjudication differ a lot from what could be characterised as a more traditional mode of adjudication in China. A characterisation of rights-centred adjudication in this way owes a debt to Fuller's famous characterisation of adjudication as most importantly a forum for the production of 'proof and reasoned argument' by both (all) parties, and also follows him in considering the authority of, or claim to authority by, the judge, regarded by some as the most important characteristic of the adjudication process in a 'legal system', as secondary. But this alone does not support the assertion that different processes of dispute resolution have 'different moralities', as Fuller famously claimed.

*Sun Zhigang's case, and a change of perspective in criminal adjudication.* So let us first turn to the case that made the *Internment and deportation measures* dealt with in Chapters Five and Six famous, and led to their eventual demise. Sun Zhigang was a designer with a university degree who – in a sequence of events by now already familiar – was arrested one day in Guangzhou for not carrying all the documents required under the ‘three no’ rule with him – he was not carrying his ‘temporary residence permit’ with him. Despite the fact that Sun’s employer reportedly provided ‘the relevant documents’<sup>2</sup> within hours, Sun was kept interned for three days. On the third day of his detention, a number of people, including (some of) his room-mates and at least one official working at the hospital affiliated to the station, beat Sun Zhigang to death. They were subsequently arrested and charged. By the time it was tried in June 2003 in Guangzhou, the case had attracted enormous media attention.<sup>3</sup> One of the twelve accused of the murder of Sun Zhigang, the official, was sentenced to death to be immediately executed.<sup>4</sup>

As we already know, an application for the abolition of the *Directives for Internment and Deportation* and subsequent events culminated in their abolition and replacement with a better piece of legislation. Thus the events triggered by the murder of Sun Zhigang had an impact far beyond the realm of criminal law, into the realm of administrative and constitutional law. This case was a case

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<sup>2</sup> *China Daily Hong Kong Edition*, ‘Tragedy spurs end to 21-year-old rule on vagrants’, 19 June 2003, available at [http://www.chinadaily.com.cn/en/doc/2003-06/20/content\\_239912.htm](http://www.chinadaily.com.cn/en/doc/2003-06/20/content_239912.htm).

<sup>3</sup> Some of the extent of the media reports may perhaps be attributed to the fact that just at that time, as a consequence of the SARS outbreak in Guangdong, Beijing and other parts of China, the media were experiencing a brief period of relative freedom, during which, for instance, ‘the right to be informed’ could be discussed. I discuss this sequence of events in passing in Chapter Nine.

<sup>4</sup> By contrast, being sentenced to death with deferred execution (*sihuan*, 死缓) regularly results in a commutation of the punishment to life imprisonment.

about a crime, a case about constitutional rights, and a case about political reform.

Sun Zhigang's father was reported to have said:

'My son has died an undignified death! An unjust death! A cruel death!  
But if my son's death can speak to the better nature of those who enforce  
the law; if it can prevent that more ordinary citizens have to die this  
undignified death, then I can accept his death [as not in vain].'<sup>5</sup>

He did not, in this instance, demand to see the law that served as the basis for his son's arrest abolished, and merely appealed to the 'good nature' of 'law enforcement officers.' Reportedly, the family of the deceased initiated a litigation procedure against the internment and deportation station or its higher ranking authority, but it is also reported that a settlement was reached between the parties, who were unwilling further to propitiate the case, for instance by seeking 'constitutional' review of the *Directives for Internment and Deportation* at the initiative of a court,<sup>6</sup> or even just to insist on a decision.<sup>7</sup> But then, it is well known in Western countries, too, that it can be extremely difficult to find plaintiffs in civil rights cases, who are willing to see a court litigation through to a court decision. No one should be forced to do so; nor is it at all clear that they generally *ought to* 'see it through,' as typically many considerations will come into such a decision, and a settlement does not have to represent a bad

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<sup>5</sup>'Reflections on the legal difficulties in adjudicating Sun Zhigang's case in first instance – in order to attack bad law [efa] we must uphold the Constitution [xianfa] (*Fansi Sun Zhigang an yi shen falü kunjing*, *daji efa yao taichu xianfa*, 反思孙志刚案一审法律困境 打击恶法要抬出宪法)', *China Economic Times* (中国经济时报) 11 June 2003, available at <http://www.sina.com.cn>.

<sup>6</sup> Consider the options available. Under Article 9 of the *Statutes on Filing Regulations and Rules* (*bei'an*, see Chapter Five) only the consistency with other administrative norms, all below State Council level, could have been challenged by a citizen by submission to the State Council, so challenges to ordinary NPC laws and the Constitution could not, *prima facie*, have been brought under this procedure. The same would apply according to Article 53 of the *Administrative Litigation Law* to the Supreme People's Court's right to submit questions of consistency between administrative norms below State Council level to the State Council. But the new procedure according to Article 90 of the *Legislation Law* (see below) would have allowed the Supreme People's Court to submit the question to the NPC Standing Committee..

<sup>7</sup> Wang Zhenmin's (王振民) LL.M. class in Constitutional Law, Tsinghua Law School Beijing, 9 October 2003.

compromise. Nor, indeed, is it clear that many cases may *not* be settled under circumstances where a court decision would have been desirable, but power imbalance or similar circumstances ‘forced’ a party to agree to a settlement. Not all unlucky circumstances could possibly be obliterated by even the most enlightened practice of legal rights protection.

It is therefore not useful to dwell on the fact that in this instance, no court decision on the legality of Sun’s internment was reached. But one should not, either, be too easily persuaded that criminal procedure could be a procedure for rights protection;<sup>8</sup> it is that as little as the administrative ‘supervision’ procedures discussed above. A simplistic understanding of rights protection underlies claims that the imposition of punishment by the state is the result of a ‘balancing’ act between the rights of the victims of a crime and the rights of the criminal: this makes it appear that violation of one citizen’s rights requires violation of the rights of the wrong-doer.<sup>9</sup> The *violation* of rights cannot possibly ever be required of the state, only reasonable measures for their protection from infringement, also by private citizens, and for providing redress. Whether the institution of criminal punishment is sufficient (or even at all suitable) to provide either is not a foregone conclusion but notoriously a matter of much debate. From a rights perspective, punishment requires justification as an invasion of rights; but there is another aspect to the justification of punishment which cannot be phrased in rights terms, and which appears to involve the justification of blame, or of measures expressing blame.

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<sup>8</sup> Despite the popularity of talking about ‘protecting the rights of victims’ through harsher laws against defendants (criminals).

<sup>9</sup> Again, this could remind one of the expression ‘homicide is compensated by life’, *sha ren chang ming* (杀人偿命). This is how the assumption is sometimes put in the context of discussions about the death penalty, for instance, where of course the central right in question is the right to life (often both on the side of the victim and of the criminal).

The punishment of the murderers of Sun Zhigang did nothing to protect *his* rights. Nor is it evident that the relatives of the victim had any right that his murderers be punished.<sup>10</sup> It would have been different if there had been any court procedure examining the legality of his internment. Realistically, such a procedure would have had better chances of succeeding, if it had been able at least also to attack the constitutionality of the old *Directives*.<sup>11</sup> But these conditions did not in fact obtain. In some ways, the absence of the requirement of rights protection appears to simplify what justice requires: punishment can then be understood as being the main technique by which to achieve – retributive – justice. Conversely as has been argued above, rights protection does not by itself justify punishment,<sup>12</sup> although once rights protection is accepted into a practice of criminal law it will shape and alter this practice. At the same time, as it addresses an individual wrongdoer rather than an institution, criminal punishment has a potential for affecting the mind of that person: which is something impossible, or at least less important, when a measure addresses an institution. The mind of the wrongdoing official abusing their power, or of course of any other criminal, comes into focus when he is punished.

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<sup>10</sup> Even procedures allowing the victims of crimes or persons related to them to ‘force’ the public prosecution of a crime, or allowing for a kind of ‘private’ prosecution, do not give a right to punishment of a criminal.

<sup>11</sup> It is all the more interesting to note that the newspapers were quick to report that a number of officials involved in the case had been promptly ‘disciplined’ See Xiao Wenfeng (肖文峰), ‘Trial opened in the case of inflicting bodily harm on Sun Zhigang resulting in his death; more than twenty responsible persons have received disciplinary measures (*Sun Zhigang bei guyi shanghai zhisi an kaiting 20 yu zeren ren shou chufen*, 孙志刚被故意伤害致死案开庭 20 余责任人受处分), *Xinhua* 5 June 2003, at [http://news.xinhuanet.com/legal/200306/05/content\\_904317.htm](http://news.xinhuanet.com/legal/200306/05/content_904317.htm).

Wang Lei (王磊) in his article ‘Examination of the constitutionality of internment and deportation (*Shourong qiansong de xianfaxing shencha*, 收容遣送的宪法性审查) 29 (2003) *Huadong Political and Legal Institute Journal* (华东政法学院学报) at p. 97 elaborates on the fact that the *Directives for internment and deportation* were abolished by a fairly hazardous procedure, rather than in the course of constitutional review.

<sup>12</sup> I understand rights protection in a narrow sense, as the reaction to a rights actually asserted, here.

This allows one to see the administration of criminal justice as aiming at a public recognition of truth and guilt relating to the crime. It is also an important conclusion for understanding a relation between the 'persuasive' practice of mediation and the clearly coercive, or even cruel and violent, practice of criminal (corporeal) punishment untempered by a practice of rights protection. Both, of course, aim at determining what should be done, rather than at determining what rights one has. It is one of the great achievements of the imperial Chinese legal tradition that within this framework, humane considerations such as the criminal's having a dependent parent, came into the magistrate's decision to a great extent.

Tentatively, *Sun Zhigang's Case* could be used to draw a further parallel: the attempt to re-direct attention or to concentrate attention on an individual culprit. This could supply a valid parallel with the ingenuous, clever-but-innocent technique adopted by the mediator 'Porridge' Su in the fourth chapter. But Su succeeds because in a sense he does draw attention to the very centre of the conflict: which is of course (or so we are meant to believe) the unhappy son and husband whom the disputing parties both, presumably, claim as object of their care and affection. By contrast merely punishing a few officials in the context of wrongful internment and deportation could not possibly have solved this issue of great legal, moral and social concern: it is a form of re-direction or direction of public attention, but a wrongheaded one. *Sun Zhigang's Case* is an instance of requiring criminal punishment to perform more functions than it actually can serve; yet what makes it famous is that it is also among the first prominent cases which triggered a reaction beyond criminal punishment of Sun's killers, and

thereby testified to the ongoing transition towards rights centred thinking, which is gradually also influencing criminal legal practice itself.

In this area itself, there has most importantly been a change of attitude toward the extortion of confessions by torture. Torture continues to be a common phenomenon in Chinese police detention and interrogation, both prior to and after a formal arrest according to the Criminal Procedure Law.<sup>13</sup> But attempts have been made recently to reduce its use, even though at the moment the extent and character of such attempts rather confirm the enormous extent to which torture is still being used. Traditionally judges were required effectively to endorse the use of torture by making convictions on the basis of coerced confessions. There was no real right to silence. For decades, the saying ‘who makes a clean breast [of his crime] will be treated leniently; who obstinately resists, will be treated harshly’ was displayed on the walls of most Chinese police stations, that is, where suspects would be interrogated.<sup>14</sup> Many police officers think that cases cannot be ‘solved’ (*po'an*) without using torture.<sup>15</sup> According to Article 93 of the *Criminal Procedure Law*, the suspect still has the obligation ‘to answer questions

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<sup>13</sup>To quote Amnesty International: ‘Amnesty International continues to document cases where police have reportedly ‘solved’ criminal cases by extorting confessions through torture. The organization has documented torture perpetrated by law enforcement and judicial officials at all levels, ranging from security personnel sub-contracted by police, right through to judges; similarly, torture is known to have taken place in every form of detention facility in China, even in courtrooms.’ Amnesty International report, ‘Executed According to Law?’, March 2004, available at <http://web.amnesty.org/library/index/engasa170032004> (part 4 of the report).

<sup>14</sup>*Tanbai congkuan, kangju congyan* (坦白从宽抗拒从严).

<sup>15</sup>Shi Fei, ‘Celebrating the demise of the principle “who makes a clean breast will be treated leniently, who obstinately resists will be treated harshly” (*Huansong “tanbai congkuan, kangju congyan” tuiwei*, 欢送“坦白从宽抗拒从严”退位)’, 9 December 2003, available at [http://www.ah.xinhuanet.com/xinwen/2003-12/09/content\\_1313545.htm](http://www.ah.xinhuanet.com/xinwen/2003-12/09/content_1313545.htm) also emphasises the connection between this principle and torture in police detention, and the fact that this attitude is still prevalent.

To quote Chen Ruihua (陈瑞华), ‘the problem of criminal procedure in the final analysis is one that goes to the nature of the judicial system, especially the relationships between the Public Security Organs, the prosecution organs and the People’s Court. Chen Ruihua, ‘Major Issues Concerning the Reform of Criminal Judicature in China’ (2000?) translated by Yang Yushen and revised by David Kelly, available at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=1720](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1720). (No date of publication is explicitly stated.)



truthfully', and only the right 'to refuse to answer such questions as have no connection with the case.' As Song Yinghui writes in 2003,

'The suspect's statement is turned into almost the sole aim of the criminal investigation process. In order to obtain a confession even inappropriate [not legally available] measures may be taken, and at times this results in grievous violations of the suspect's right to bodily integrity. In our law enforcement and judicial practice [*sifa shijian*] the reliance on confessions is very strong, almost to the point where "when one has not obtained a confession, this cannot be counted as having solved the case [*po'an*]."'<sup>16</sup>

Besides Article 93, a further factor is that witnesses in China often do not appear in court as they do not wish to be caught up in the criminal justice process. Articles 47 and 48 of the *Criminal Procedure Law* require witnesses to appear in court, but there are no provisions for enforcing the legal duty to appear in court in the *Criminal Law*. This is widely considered as further increasing the importance of confessions.<sup>17</sup> The consequences of the pressure on obtaining a confession are maltreatment and torture.<sup>18</sup>

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<sup>16</sup> Song Yinghui (宋应辉), *Introduction to the Elements of Criminal Procedure* (*Xingshi Susong Yuanli Daodu*, 刑事诉讼原理导读, Beijing: 2003), at p. 329. Some legal professionals even consider that the 1996 reform in some ways lowered the standard of protection of the rights of the defendants. He Jiahong (何家宏) analyses as follows. 'Perhaps this is a conception handed down to us by our traditional judicial practice. But then we have to change now. We cannot go on handling cases revolving around the testimony of the suspect (*kougong*, 口供); we ought to promote the principle of going from evidence to suspect's or defendant's statement; that is, of first gathering [independent] evidence, and then using the defendant's statement to confirm it.' He Jiahong (何家宏), contribution to 'Law online: on torture (*Fazhi zai xian: xingxun bigong*, 法制在线: 刑讯逼供)', *Renminwang*, 22 October 2003, at <http://www.people.com.cn/GB/14576/15157/2146427.html031022>.

<sup>17</sup> Article 46 of the *Criminal Procedure Law*, while saying that no conviction must be made solely on the basis of the defendant's statement (confession), but this provision, which aims to reduce the use of torture to elicit confessions, is of little significance in criminal practice.

<sup>18</sup> The extent of the problem of torture is further illustrated by what some authorities and individuals do to reduce its use. Indeed, a People's Procuracy in Fushun City in Liaoning Province attempted to stop it by an internal directive ordering its officials (procurators) that any statements obtained from suspects in police detention 'should be entirely disregarded' (*shi zhi wei ling*, 视之为零). Only the knowledge that torture was inflicted *routinely* could justify such a measure. For the report on this see Liu Jinyou (刘金友), 'The right to silence, the value of defendants' or suspects' statements and "zero confession" (*Chenmoquan, kougong jiazhi yu "ling kougong"*, 沉默权、口供价值与“零口供”)', published by *China Legal Daily*, 10 February 2002, at [http://www.legaldaily.com.cn/gb/content/2002-02/10/content\\_31946.htm](http://www.legaldaily.com.cn/gb/content/2002-02/10/content_31946.htm)

Importantly, there is not only a great perceived need to obtain a confession to prove someone guilty. There is also resentment toward persons whose guilt is strongly suggested by evidence but who maintain their innocence: they, too, still have to be brought to confess, or 'confess'. In recent years, there have been several newspaper reports on the phenomenon of guilty verdicts 'with zero confession'.<sup>19</sup> The news value of such cases illustrated how unusual they still were. This particular and distinctive *motif* for torture indicates that again, (public) recognition by the individual at the centre of a legal dispute, of its central facts, is considered to be of the highest importance for a 'resolution'.

If we can now observe a change of attitude about torture, it is concurrent with changes in conception of the relationship between truth and law. In any legal procedure, we may take it, one seeks to approximate knowledge of the relevant facts; but beyond this, value is seen in achieving a shared understanding or perception of the truth. Rarely, too, can it be the case in China that someone is tortured to see if they are not, after all, innocent, although such a proceeding is of course imaginable, for instance in the context of medieval ordeals. Torture is normally premised on an assumption of the torturer's having 'got it right,' that is, of having got hold of the right suspect already. Consider, in this context, a police officer's description of what happens when officials are in the habit of practicing torture:

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Amnesty International claims that in December 2003 there were 460 deaths and 117 cases of serious injury caused by "abuse of power and dereliction of duty" by law enforcement officials during the first 10 months of 2003.' *Ibid.* sub 3.1.

The vice president of the National People's Procuracy, Gu Chunwang (贾春旺), put the number of public servants prosecuted because they 'imposed illegal detention, practiced torture, disrupted [political] elections, or in other ways infringed the right to personal integrity or the political rights of citizens' in 2003 at 1408. BBC (Chinese version), Chinese courts cooperate in the protection of private property (*Zhongguo fayuan peihe baohu siyouchanquan*, 中国法院配合保护私有产权) at [http://news.bbc.co.uk/hi/chinese/news/newsid\\_3498000/34984041.stm](http://news.bbc.co.uk/hi/chinese/news/newsid_3498000/34984041.stm)

<sup>19</sup> (*ling kougong* 零口供).

'Legal interrogation of criminal suspects is an important part of criminal investigation. [But] in practice there are a few officers who, when handling cases, overindulge in a sense of special powers, and who apply the law with a notion of "The law, that's me," or "The law enforcement officer, that's me".'<sup>20</sup>

It is not surprising, given this background, that Chinese courts should have to struggle hard to be 'allowed' to state a suspicion of torture having taken place in a court decision, and that reportedly even courts themselves may use torture in the process of criminal adjudication.<sup>21</sup> The judgement in last instance by the Liaoning Province Court on *Liu Yong's Case* in 2003 was resented, because it said explicitly that 'the possibility of the defendant having been tortured by public security organs to extort a confession could not be excluded.'<sup>22</sup> This was thought to be a daring thing on the part of a court to do. It was also thought that this might set an example for other courts.<sup>23</sup>

*The protection of rights in administrative or civil procedure.* In the case of old Mr Yuan above, after obtaining an order in the course of administrative reconsideration, the family discovered that the authorities ordered to pay damages

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<sup>20</sup> Zhang Yansheng (张燕生), a police officer in a district of Changde City in Hunan province, in a contribution to 'Legal System online: torture (*Fazhi zai xian: xingxun bigong*, 法制在线: 刑讯逼供)', *Renminwang*, 22 October 2003, at <http://www.people.com.cn/GB/14576/15157/2146427.html>031022.

<sup>21</sup> I elaborate on this case in chapter nine, where I discuss the role of criminal defence lawyers.

<sup>22</sup> See Lin Chufang (林楚方), 'Sentenced to death in first instance but escaped with his life in second instance – an investigation into the overturning of the verdict in Liu Yong's case (*Yi shen pan sixing ershen taochu shengtian, liu yong an gaipan diaocha*, 一审被判死刑二审逃出生天 刘涌案改判调查)', 28 August 2003,

*Renminwang* website at <http://www.people.com.cn/GB/shehui/1063/2041979.html>.

<sup>23</sup> In an interview with Chen Guangzhong of Beijing's University of Politics and Law he stated: 'That the court *dared to mention* "that we cannot rule out the possibility of torture;" (...) *to dare write this* [into a court judgement] is in my opinion a good sign; it is an expression of the spirit of the rule of law.' Interview 'Special visit paid to the vice president of China's Legal Academic's Society Chen Guangzhong: the conversion into suspended death sentence was an expression of the spirit of the rule of law, (*Zhuanfang Zhongguo faxuehui fuhuizhang Chen Guangzhong: gaipan sihuan tixianle fazhi jingsheng*, 专访中国法学会副会长陈光中: 改判死缓体现了法治精神)', 24 December 2003, available at <http://www.law-thinker.com/detail.asp?id=1900>. Emphases added.

were unwilling to do so. In April 2001, therefore, they filed an application for administrative litigation with the Futian District Court [of Shenzhen], against the branch police station and the Shenzhen City internment and deportation station, for a declaration that the administrative measure against Mr Yuan had been illegal and an order to pay damages, including compensation for psychiatric damage.<sup>24</sup> The first instance decision rejected the complaint. The only piece of legislation it cited were the (regional, not national) *Regulations for the Handling of Temporary Residence Permits in the Special Economic Zone of Shenzhen*,<sup>25</sup> and applying these, the court found that there were no specific provisions regarding the age of those to be arrested for not being able to produce a temporary residence permit, etc. Article 45 of the *Regulations* said that those without the required documents were to be handed over to the authority under the Department of Civil Affairs, and deported from the Special Economic Zone. Since Mr Yuan did not have his temporary residence card with him at the time of his arrest, and since there was no *explicit* exception for the elderly from internment and deportation measures, the court thought there had been no technical mistake. This decision, so far as we know, did not consider whether the Shenzhen rules just quoted contravened higher ranking law or if there had been an unlawful use of administrative discretion.<sup>26</sup> According to the newspaper report available on the case, there is no indication that the decision considered the wrong entry into the station's register and the way this made it more difficult for Mr Yuan's family to trace him. The court judgement at first instance, thus even went back on the outcome of the reconsideration procedure (although as we saw,

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<sup>24</sup> More literally, 'mental loss', *jingshen sunshi* (精神损失).

<sup>25</sup> *Shenzhen jingji tequ zhanzhu ren yuan hukou guanli tiaoli*, (深圳经济特区暂住人员户口管理条例).

<sup>26</sup> See Article 54 (2) of the *Administrative Litigation Law*.

the decision made in the course of that reconsideration procedure had not been respected and not been carried out).

The second instance decision by the Shenzhen City Intermediate Court, was made on 24 June 2003, just a few days after the trial in the Sun Zhigang murder case, and in the context of widespread indignation about the internment and deportation system (so far as it applied to ‘vagrants’). The second instance court found that the internment of Mr Yuan had been illegal, and awarded damages for expenses incurred by the family in the course of administrative litigation, but no compensation for psychiatric damages.

‘Ms Wang [the daughter] said yesterday evening that even if the court had not supported Yuan Wen’s claim for compensation for psychiatric damages, it was enough for them that it had decided that the administrative acts of the two defendants were illegal. “We are not after so and so much compensation; the main thing is for government to give an apology [gongdao].”’<sup>27</sup>

In a case adjudicated ten years earlier, the plaintiff had been less fortunate. So far the only case, apparently, of litigation against a state authority for wrongful internment to have made it into a published casebook of *Exemplary Decisions in Administrative Litigation*,<sup>28</sup> is the case of a man named Li Caokang. In the early morning of 17 April 1993 he was picked up by a police officer of the Shanghai City Yuyuanlu branch police station, and taken to an internment and deportation station. He was carrying his identity card with him. According to the facts as

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<sup>27</sup> The expression she uses contains the word *gongdao*, already discussed in chapter two: *zhuyao shi zhengfu yao gei ge gongdao* (主要是政府要给个公道).

<sup>28</sup> Jiang Yong (蒋勇, editor), *Exemplary administrative litigation cases (Dianxing xingzheng susong anli*, 典型行政诉讼案例, Beijing: 2000). Note that the word for ‘exemplary’, ‘*dianxing*’, does not always connote ‘good’. But see the account of the specific comment on this case in the main text. The decision was published online at <http://www.law999.net/casefocus/doc/XIZH/2003/00000076.html>.

ascertained by the court,<sup>29</sup> he told the policeman that he was out of work and had no relatives in Shanghai, he himself having come from Nantong to Shanghai by ferry, as his ferry ticket corroborated. Because he had not found work and also had no relatives or friends in Shanghai, he had slept that night rough in the street. In accordance with the *Shanghai Regulations for the Handling of Internment and Deportation*, he was interned. The internment station contacted the local government of the place of Li's household registration, asking Li's relatives to come to Shanghai to fetch him home. Li Caokang, according to the court's summary report of the facts, turned out to be 'very weak' during the period of his internment; he 'would not eat.' The court decision states that he was taken to a clinic twice, where the doctors failed to discover anything the matter with him. On 20 April, he was taken to the accident and emergency department of a Shanghai municipal hospital, where they could not discover any illness.

But on the morning of 21 April, Li Caokang was found dead in his room. According to the hospital's report as referred to later by the court, the staff of the internment station 'inferred that he had died of "a slow consumption".' 'When they tidied his room, they found' Li's work permit, certifying that he had actually been employed as a construction worker with a Shanghai company. The court report does not explain why this work permit was only 'found' after his death, when such a document ought to have helped Li to oppose the internment measure. Nor does it mention whether Li Caokang also had a temporary residence permit, and/or whether such a permit was also found among his things.

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<sup>29</sup> See Wang Zhenmin (王振民), *Casebook on Constitutional Law, Tsinghua University Law School (Zhongguo xianfa anli jiaocheng, Qinghua Daxue faxueyuan, Beijing 2002 nian ba yue, 中国宪法案例教程, 清华大学法学院, 北京, 2002 年 8 月, unpublished, Beijing: August 2002)* at p. 121.

Li Caokang's father Li Caofu filed an application for administrative reconsideration with the Civil Affairs Bureau (the bureau in charge of internment and deportation stations), asking for an annulment of the 'specific administrative act' of internment against his son. This was declined and so he filed a lawsuit against the internment and deportation station, [also?] demanding compensation. He said that his son should not have been interned, and that the station had failed to take appropriate action to help Li Caokang in his illness, and thereby hastened his death.

The court held that the police branch station had correctly come to the conclusion that Li Caokang was jobless and homeless and vagrant. This had been evidenced, it thought, by Li's own statement and 'relevant documents', and therefore to impose an internment measure 'was in accordance with the *Directives for Internment and Deportation of Urban Vagrants and Beggars* and the *Shanghai Regulations for the Handling of Internment and Deportation*. There had been no mismanagement. The correct law had been applied, the station had provided adequate medical care and had informed Li's family in a timely manner, and in accordance with law, the measure must be upheld.' There was no legal basis, the court decided, for the request for compensation. But remarkably, 'in order to demonstrate the government's concern,' the station had in the course of the adjudication procedure 'voluntarily undertaken' to make an 'aid' payment to Li Caofu, in the amount of 1000 Yuan. Citing Article 2, subsection 3, of the *Directives*, Article 7, subsection 2 of the *Shanghai Regulations* and 'the relevant provisions' of Article 54, subsection 2 of the *Administrative Litigation Law*, the court rejected Li Caofu's application, upheld the specific administrative act, and

stated that the internment station had ‘voluntarily’ undertaken to pay 1000 Yuan to Li Caofu.

A commentary by a ‘legal expert’ on this case praises the decision, saying that the administrative act was in accordance with the ‘substantive law’, that there had been no procedural mistake and that the specific administrative act had been decided, communicated and served in an unobjectionable manner. Indeed, invoking the important standards, or requirements, already discussed in the context of mediation, the commentator praises the conduct of the station as ‘having a basis in law, and according with feeling and reason.’<sup>30</sup> Doubtless, this positive appraisal is also the reason why the decision came to be included in a collection of ‘exemplary’ cases. The application of the law alone was perceived as too harsh and so it was ‘tempered’ by feeling and reason.

Comparing Li Caokang’s case described just now with Yuan Wen’s case, we can get a sense of some development in administrative litigation practice in China. Presumably, formal ‘justifications’ for administrative measures, which are flawed in substance, are now less readily accepted by courts. But great difficulties remain. With the creation of the administrative litigation law certain – not all – so-called specific administrative acts were subjected to judicial review in China. The *Administrative Litigation Law* has not, however, provided any remedies against laws and ‘abstract administrative acts’; that is, administrative legislation according to the *Legislation Law*. It is not effective, either, against much of the

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<sup>30</sup> To quote from the original: ‘*Qiansongzhan juci zuochu dui qi shourong qiansong de juti xingzheng xingwei, shi yu fa you ju de, heqing heli* (遣送站据此作出对其收容遣送的具体行政行为, 是于法有据的, 合情合理的).’ *Ibid*.



'legislation' occurring in the shape of various 'normative documents' produced by the administration.<sup>31</sup>

The purpose of administrative litigation from the point of view of the citizen is to obtain an annulment or partial annulment of an administrative act, and possibly also to obtain compensation (compare Articles 54 and 67 *Administrative Litigation Law*). But such remedies are not available against all specific administrative acts against which, according to the abstract definition presented above, they could be made available. Remedies are available only in cases enumerated – non-exhaustively - in Article eleven of the *Administrative Litigation Law*. Most importantly in the context of internment, specific administrative acts restricting one's right to personal freedom and to property are subjected to judicial review.<sup>32</sup>

We have to understand two kinds of restriction in the review of administrative acts in the context of administrative litigation: of the extent to which review can be undertaken (only specific acts), as well as of the kinds of specific administrative acts and rights violations that can be subjected to review. (One act may affect or restrict a number of different rights.) Even if certain administrative acts cannot become the subject of *administrative* litigation, they may still become the subject of civil litigation.<sup>33</sup> This makes it more difficult to

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<sup>31</sup> See Luo Haocai, *ibid.* chapter 4 (pp. 97 ff.) on 'abstract administrative acts'. See also above in the main text, on the few 'abstract administrative acts' subjected to administrative reconsideration.

<sup>32</sup> Note restrictions on the procedural admissibility to administrative litigation by the Supreme People's Court's judicial 'Interpretation on problems relating to the application of the Administrative Litigation Law (*Zuigao renmin fayuan guanyu zhixing xingshi susongfa ruogan wenti de jieshi*, 最高人民法院关于执行刑事诉讼法若干问题的解释)', Judicial interpretation 2000 no. 8. Cp. Wang Zhenmin's *Casebook* p. 31.

<sup>33</sup> In some continental European jurisdictions the distinction between 'public individual rights' and rights in civil relationships is considered to dictate a difference in appropriate court procedures for their protection. And even to require different courts.

There is an ongoing discussion about creating special administrative courts in China. See Wu Nan (武楠), 'The courts should set up internal administrative courts (*Fayuan neibu ying sheli*

understand the use of a distinction between administrative and civil litigation in the first place.<sup>34</sup> - In civil litigation, we observe that courts allow themselves considerable freedom in ‘accepting’ cases ‘for handling’ – or not, sometimes for reasons to be discussed in Chapter Eight in reference to the position of courts vis-à-vis other political powers.

The scope of laws which according to the *Administrative Litigation Law* should be used by the courts, is also restricted. It is defined in its Articles 52 to 53. Without making specific reference to the Constitution, it includes the laws and ministry and provincial level administrative regulations made in accordance with the *Legislation Law*. Besides ‘application’ of these, the law allows the ‘use for reference’ of further administrative regulations at lower levels according to Article 53. There is no clear direction in the legislation as to how the difference between ‘application’ and ‘use for reference’ should be understood. In the above case of Li Caokang, both the *Directives* and the *Shanghai City Regulations* on internment, as well as of course the *Administrative Litigation Law*, are norms within the scope defined by Article 52 *Administrative Litigation Law*, and were cited by the court.

In practice, documents of much less certain legal status will often be used and cited as ‘legal basis’ for court decisions, while the only mention made of the Constitution in the *Administrative Litigation Law* is the claim that ‘this law has been drafted on the basis of the Constitution’ in Article 1. This is the problem,

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xingzheng fayuan, 法院内部应设立行政法院),’ *China Legal Daily*, 3 July 2003, at [http://www.legaldaily.com.cn/bm/2003-07/03/content\\_35920.htm](http://www.legaldaily.com.cn/bm/2003-07/03/content_35920.htm).

<sup>34</sup> To understand the point of this distinction one might advance that the citizen-state relationship demands a presumption of freedom in favour of the citizen, which would not make sense if applied to the relationships between private individuals. The state has a different obligation to protect freedom of speech or the right to education, say, than private citizens. For a concise discussion of this conception of ‘basic rights’ against the state, see Isensee, Josef, ‘Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht’, paragraph 111 in *Handbuch des Staatsrechts* (Heidelberg: 2000). - Where the differences indicated here are not sufficiently recognised, there is indeed some danger that protection will be insufficient.

already encountered in the fifth chapter, of ‘red-headed documents’. According to the Supreme People’s Court’s understanding of abstract administrative acts as referred to in the *Administrative Litigation Law*, any administrative command (‘document of binding character’) addressed to an indefinite number of persons and allowing for multiple application is exempt from court scrutiny as ‘abstract’. Unbelievably, this would appear even to include the ‘regulation’ used by the Lianyuan internment and deportation centre for setting tariffs for ransom: at least as long as one did not adopt a logically circular interpretation of ‘of binding character’ in the sense of a substantive examination of whether the document in question could have binding character by the standard, say, of rationality or legality or justice. As we saw in the last chapter, the new *Litigation Law* has tried, for instance in Article 64, to establish a hierarchy of legal norms and to affirm the general principle that a higher-ranking norm supersedes a lower-ranking one in cases of inconsistency, but courts are nowhere explicitly authorised to take it upon themselves to make assessments of inconsistency.

In an apparent move to assert greater independence, as well as to enable more coherent and principled decisions, courts will sometimes choose *not* to apply or ‘use for reference’ certain regulations.<sup>35</sup> In rare cases they will even make an explicit statement about inconsistency, but in doing so, they take personal risks. For instance, in 2003 two judges in Luoyang faced severe

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<sup>35</sup> One may consider that this practice of non-reference borders on judicial review. See, for instance, ‘Case of Zhou Jianjun v Beijing City branch traffic police squad of Chaoyang District traffic police (*Zhou Jianjun su Beijing Shi gong'an jiaotong guanliju chaoyang jiaotong zhidui jidongdui an*, 周建军诉北京市公安局交通管理局朝阳交通支队机动队案), in Wang Zhenmin’s *Casebook*, p. 39. In this case the court held that the legal basis for imposing a certain fine should have been a higher ranking norm, which prescribed much lower fines.

Courts are in some sense in a Catch 22 situation. If they just do not refer to norms they deem illegal (unconstitutional), they can neither really state the full reasons for their judgement, nor expect to influence later judicial practice. If they submit the question of illegality to another body, they give the decision away – to someone else who may seem little fit to perform the task of review; this raises the question in how far judges can lawfully be asked to make judgements which they are convinced violate the Constitution.

consequences – initially it was expected at least one of them would be fired, and she lost her party membership - for writing into a judgement that a certain local regulation contravened a national regulation and *therefore* could not be applied.<sup>36</sup> Opinions about this case were divided, and many recognised that in practice, this may be the only way in which courts can respect their perhaps more important obligation to honour the Constitution, or to honour higher-ranking law (for reasons discussed at greater length in the next chapter). Yet because how to do so is notoriously a matter of great disagreement, this practice, however useful in individual cases, does nothing to strengthen the legal system as a whole. The problems indicated here – how to ensure coherence among legal norms and ‘sort out’ norms that only purport to be legal, is even more urgent in the context of conformity with the Constitution, to which I now turn.

*Protection of ‘constitutional’ rights?* Where does the last section’s identification of the applicable procedural law in administrative and civil litigation respectively leave the argument above, about the unconstitutionality of the internment and deportation measures? Where does it leave Wang Xingmao’s, Ma Jiyun’s, Li Caokang’s, and others’ constitutional rights to equality and personal freedom? We observe that in both actual decisions just discussed, constitutionality was not an issue addressed by the court. But that, of course, does not mean that it might not have been; especially given the attention paid to constitutionality problems in China in the very recent past.

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<sup>36</sup> See a discussion of this by Cheng Jie (程洁), ‘How to understand court supervision by local People’s congresses (*Ruhe lijie difang renda dui fayuan de jiandu*, 如何理解地方人大对法院的监督) in the *21st Century Economic Herald* (21 世纪经济报道), 5 December 2003, at <http://www.people.com.cn/GB/14576/15157/2230127.html>. See also the comprehensive report ‘Luoyang City “Seed” Case Highlights Chinese Courts’ Lack of Authority to Declare Laws Invalid’ (2004) *China Law and Governance Review* (June issue).

So far only few Chinese judges dare openly to claim that they are applying the Constitution when adjudicating cases, even cases about constitutional rights (which, of course, may have been affected by a specific administrative act coming under review according to the *Administrative Litigation Law*). The problem is not so much by what procedure certain constitutional rights should be protected, as that there appears to be no such procedure at all to the majority of Chinese legal practitioners. For instance, to date, it appears that there has been no court procedure based on a claim that someone's freedom of speech was infringed by a public authority.<sup>37</sup> A complaint (case) to that effect filed with a Chinese court would be likely not to be 'accepted for adjudication' (*shouli*).<sup>38</sup> The real issue is not a technical one, but rather another required change of perspective. There is a genuine dispute – a dispute sustained by conviction on both sides – as to whether the Chinese Constitution can be interpreted (and 'applied') by Chinese judges.

So now we have to address the already mentioned 'judicialisation of the Constitution' discussion.<sup>39</sup> According to Article 3 of the Constitution the National People's Congress (NPC) 'supervises' the administrative, the people's courts and the people's procuracies, and Article 57 gives the NPC the status of the highest organ of state (Article 57). More specifically, the Constitution states in Article 62 that it has the right to amend the Constitution and to 'supervise its implementation'. The NPC only meets for two weeks a year and is otherwise represented by its Standing Committee, which has the task, according to Article 67 of the Constitution, to 'interpret and amend' the Constitution. It is around this

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<sup>37</sup> By contrast, and a little paradoxically, administrative litigation on the basis of the right to personal freedom as mentioned in the *Administrative Litigation Law* are relatively frequent.

<sup>38</sup> See chapter 4 of the *Administrative Litigation Law* for the general rules on accepting a case for litigation.

<sup>39</sup> *Xianfa sifahua* (宪法司法化).

Article that much of the academic discussion revolves.<sup>40</sup> Some scholars argue that the task of interpreting the Constitution lies *exclusively* with the NPC and its Standing Committee. From this argument several further contentions have arisen: that it is not permissible in China to file a lawsuit based on a public authority's infringement of a constitutional right; that courts may not cite the Constitution or 'apply' the Constitution as legal basis of their decisions (unless they are citing more specific legislation as well); that courts may not declare legislation, including administrative legislation, unconstitutional.

The mere text of the Constitution does not settle this matter, for one thing, because it does not expressly exclude the possibility that courts may *also* interpret the Constitution. Apart from this, it is difficult to make even basic sense of the Constitution as one – or indeed 'the highest' – *law* in the land, if courts of law must not 'interpret' it at all. This is as bad as saying they must ignore it. Even in systems which reserve the task of constitutional review, for instance, to a special institution such as a constitutional court, it is of course not forbidden to other courts, but instead required of them, to interpret the Constitution, for instance because only such interpretation allows them to decide whether they should submit some specific legislation which they consider unconstitutional, for

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<sup>40</sup> See for a summary account of the opposing view, as well as for a discussion of Article 67, Zhou Wei (editor, 周伟), *Study on the Judicial Protection of Constitutional Rights (Xianfa jiben quanli sifa jiuji yanjiu, 宪法基本权利司法救济研究*, Beijing: 2003), pp. 118, especially pp. 128 ff. The authors make the important point that it is nowhere explicitly mentioned in the Constitution that the judicial organs (including procuracy) are directly bound by the Constitution, at p. 129. Their overall argument is that there is no way the judges could ignore the Constitution; similar to the argument here. Interestingly, their argument includes a reference to the Criminal Code's Article 54, which prescribes that while 'political freedoms' including (!) the right to free speech could be taken away as punishment, at least it is clear that only courts can do so.

constitutional review to the court or committee specially entrusted with this task, and to formulate a resolution to this effect.<sup>41</sup>

But courts in China are not like courts in Western countries, in many ways,<sup>42</sup> and the discussion about what they can and should do, too, is quite different from the discussions led in Western countries. The institution of the so-called ‘judicial interpretation’ reflects some Chinese peculiarities, as do the various documents binding lower courts issued by the Supreme People’s Court.<sup>43</sup> Judicial interpretations in a narrower sense<sup>44</sup> take the outward shape of codes accompanying People’s Congresses’ legislation, and providing guidance for their interpretation; these interpretations are often provided almost immediately after promulgation of a new law, and do not arise from specific cases or decisions. They look just like laws, only that each article of a judicial interpretation typically refers to (‘interprets’) the article of a law in the technical sense of this term. There are also so-called responses<sup>45</sup> issued by the Court, and sometimes published, on specific questions submitted to it from lower courts deciding specific cases; these, too, are published and circulated among the courts. In a wider sense, all these kinds of document can be referred to as judicial interpretation.

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<sup>41</sup> Article 100 of the German *Basic Law* and the corresponding articles of the *BverfGG* (the Organic Law of the Federal Constitutional Court) constitute an example of this obvious requirement.

<sup>42</sup> As I argued in chapter one, this is no reason not to talk about ‘courts’.

<sup>43</sup> See Lubman, *Bird in a Cage* (Stanford: 1999), p. 283 for an overview of the forms these documents take. For a brief summary of the history of judicial interpretations, see Huang Songyou in ‘The judicialisation of the Constitution and what it means – a discussion proceeding from the Supreme People’s court’s “approving response” today (*Xianfa sifahu jiqi yiyi – cong zuigao renmin fayuan jintian de yige “pifu” tanqi*, 宪法司法化及其意义——从最高人民法院今天的一个“批复”谈起)’, 13 August 2001, available at <http://www.gongfa.com/huangsy xianfa sifahua.htm>.

<sup>44</sup> *Sifa jieshi* (司法解释); another variety also published in the Supreme People’s Court’s official Gazette is called *yijian* (意见).

<sup>45</sup> The Chinese terms are *pifu* (批复), *fuhan* (复函) and *dafu* (答复) – these, too, are (often) published and used by courts in a way similar to that of the judicial interpretations. Lubman discusses them *ibid* (note 43).

There are three ‘responses’ (judicial interpretations in a wider sense) by the Supreme People’s Court on the question if the Constitution can be used as ‘basis’ for court decisions. The earliest one of 1955 held that the Constitution could not be used as a basis for arguments attributing criminal responsibility.<sup>46</sup> The 1986 one is widely considered to have excluded the Constitution from the body of laws and regulations that can be cited in court judgements: but whether it has, is nevertheless a matter of debate. Note the language used in the 1986 response about the scope of law applicable by the People’s Courts.

‘The People’s Courts in their adjudication of civil and economic cases according to the law can, when composing written court judgements, cite all laws made by the NPC and its Standing Committee. The People’s Courts may moreover cite all local regulations made by provincial or directly administered cities’ People’s Congresses and Standing Committee, autonomous regulations and separate regulations made as required by local conditions, *which are in not in contravention of the Constitution or of laws or administrative regulations*, if the parties to the dispute both belong to the administrative territory in question....’<sup>47</sup>

Contrary to what seems to be the mainstream interpretation, in this pre-*Administrative Litigation Law* response, the Supreme People’s Court could be argued to have implied the power of courts to interpret whether the local norms they applied were constitutional.

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<sup>46</sup> Or in Chinese, ‘*Xianfa bu yi yinwei lunzui kexing de yiju* (宪法不宜引为论罪科刑的依据). See ‘Supreme People’s Court’s Answer regarding the non-application of the Constitution as a basis for holding someone criminally responsible or measuring their punishment (*Zuigao renmin fayuan guanyu zai xingshi panjue zhong bu yi yuanyin xianfa lunzui kexing de yiju de pifu*, 最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的批复), judicial interpretation 1955, reference number 11298, issued on 30 July 1955. Wang Zhenmin’s *Casebook*, p. 30.

<sup>47</sup> ‘Supreme People’s Court’s Answer regarding the question how the courts when issuing legal documents should cite to normative documents (*Zuigao renminfayuan guanyurenmin fayuan zai zhizuo falü wenshu ying ruhe yinyong falü guifanxing wenjian de pifu*, 最高人民法院关于人民法院制作法律文书应如何引用法律规范性文件的批复)’, Judicial Interpretation 1986 no 31 of 28 October 1986, in Wang Zhenmin’s *Casebook* at p. 30. My emphasis. By contrast, Article 53 the 1989 *Administrative Litigation Law* (first paragraph) does not refer to the Constitution.



In its response in the third case, the *Case of Qi Yuling* in 2001,<sup>48</sup> the Court held that the plaintiff's right to education according to the Constitution had been infringed, both by a governmental education bureau *and* by a private further party. Some regarded this as a breakthrough for the protection of constitutional rights, invoking *Marbury v Madison* for a parallel. But there have also been voices deploring the low quality of the decision itself.<sup>49</sup> In issuing these interpretations, the Supreme Court was certainly supplying an interpretation of the Chinese Constitution – whether correct or not – and it expected lower courts to abide by these interpretations. The *Qi Yuling* decision, in allowing a claim based on a right only mentioned in the Constitution to be handled by the court, indicates that constitutional rights may play a greater role in adjudication in the future; but two issues remain: the claim that constitutional rights in China are not justiciable, and that judicial review cannot extend to the review of (administrative or People's Congresses') legislation. For these claims could be made intelligible even when it is admitted that Chinese judges, like anyone else, are allowed to

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<sup>48</sup> *Qi Yuling anjian* (齐玉苓案件).

<sup>49</sup> For a discussion of the two earlier judicial interpretations also calling the mainstream interpretation into doubt, see Wang Zhenmin (王振民), 'Can the Chinese Constitution be applied in Court? (*Shilun zhongguo xianfa kefou jinru susong*, 试论中国宪法可否进入诉讼)', at <http://202.99.23.246/wsrmlt/jbzl/wangzhenmin/wzm4.html>. In the third case, a student had obtained another student's admission letter for a school leading on to university, and after fulfilling the three further preconditions of enrollment (payment of tuition fees, a place at a specific school, and an agreement with a future employer), had run through a full course of study and obtained her degree and a job based on this degree, under the name of the student whose admission she had 'obtained'. Years later, the student deprived of university education sued this person as well as the education authority in charge of the admission procedures, for an infringement of her 'right to her name' and of her 'right to education'. The right to one's name is a right protected under the General Principles of Civil law, but for the right to education the claimant had to invoke a 'constitutional' right - a right, that is, mentioned in the Constitution but no ordinary law. The court adjudicating the case submitted the question if this claim could be based on a constitutional right, to the Supreme People's Court. The Supreme People's Court replied that the *constitutional* right of the claimant to receive education had been infringed, not only by the education authorities, but also by the other student. For a summary and discussion of this case see Huang Songyou (黄松有), 'The judicialisation of the Constitution and what it means - a discussion proceeding from the Supreme People's court's "approving response" today (*Xianfa sifahua jiqi yiyi - cong zuigao renmin fayuan jintian de yige "pifu" tanqi*, 宪法司法化及其意义——从最高人民法院今天的一个“批复”谈起)', available at <http://www.law-thinker.com/show.asp?id=205>, and for an extract from the judgement itself see Zhou Wei, *ibid.* (note 40) p. 161. The finding that a private person (the other student) infringed a constitutional right seems peculiar.

interpret the Constitution, as a precondition, for instance, of respecting it: and this, at least, they are quite clearly required to do by Article 3 of the *Judges' Law*.<sup>50</sup>

As one of the apparently most decided opponents of the Constitution's (wholesale) 'judicialisation', Jiang Shigong seeks to make a case by insisting that one should only look at 'the very text of the Constitution itself.'<sup>51</sup> One of his reproaches against people who admit 'abstract principles' into the interpretation of that text is that they invariably, he says, look at the American Constitution rather than the Chinese one, and draw on the principles of American constitutional law to argue that China, too, needs judicial review of legislation and litigation based on civil rights. This, we are to conclude, would be 'un-Chinese'. Yet it is difficult to see how an insistence on obeying the 'very text of the Constitution itself' could be of real help in the current discussion. As Jiang concedes himself, not even contemporary legal positivists would advance that the black letters of a law could somehow provide all answers to all constitutional questions, without any intermediate process of what is frequently called textual analysis.<sup>52</sup> To use a simple example, the Chinese Constitution states in Article 16 that every Chinese citizen has the right as well as the duty to be educated – but educated to what? educated how long? educated by whom? In Article 33 the Constitution protects, as already mentioned, the right to equality before the law –

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<sup>50</sup> This is discussed by Zhou Wei *ibid.* (note 40) at p. 136.

<sup>51</sup> The expression used is *xianfa benwen* (宪法本文). Jiang Shigong (强世功), 'Misconceptions regarding the judicialisation of the Constitution – discussion of the self-contradiction in the ideas of a national transformation and constitutionalism, proceeding from the self-contradictory discourse on the judicialisation of the Constitution, (*Xianfa sifahua de "wuqu" – cong "xianfa sifahua" de huayu beilun kan guojia zhuanxing xianzheng beilun*, 宪法司法化的“误区” - 从“宪法司法化”的话语悖论看国家转型的宪政悖论), 2003, at [http://article.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=23563](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23563).

<sup>52</sup> Indeed, legal positivists are ready to concede that there are abstract requirements in many legal texts; only, these may be 'vague'. Jiang describes himself as a 'traditional legal positivist', thus indicating a distance between himself and contemporary legal positivism.

but what does this mean in connection with the right to education? It seems that there is no way these questions could be answered without giving some further thought to the matter, beyond reading the 'very text of the Constitution itself;' there is no way 'abstract' ideas (principles) could be kept out of constitutional interpretation.<sup>53</sup>

In this perplexity, the question turns on *what* abstract and substantive principles need to be employed in interpreting the Constitution. This discussion should make use of the analysis offered earlier on, regarding supervision- and control-oriented approaches to good government. The idea of supervision, along with hierarchical control is as strong in the area of judicial activities, as it is in the area of administration and legislation. What makes courts different from administration and legislation, is that at least there is now widespread recognition in China that courts do need *some* independence, even if the limits of judicial independence are much argued about.<sup>54</sup> The principle of supervising officials, including judges, is to some extent opposed to having courts protect legal rights. Chinese adjudication as of today is not possible without first and foremost protecting those abstract principles which guide an ultimate judgement on what is law, and what is not.

Taking my previous discussion of the possibility of 'universalising' and of creating a 'public' context in which to make judgement into account, this is not best explained by courts, or individual judges, having some kind of self-referential 'legal' authority to pronounce what is legally true. Rather, it is because

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<sup>53</sup> If the author of the above-mentioned essay dwells very much on the fact that the text of the Constitution contains contradictory provisions without attempting a suggestion for the resolution of such contradictions, this is perhaps because he finds it impossible to get an answer out of the black letters (characters) of the 'text of the Constitution itself'.

<sup>54</sup> This argument is sometimes underrated by approaches too easily dismissing everything not immediately furthering rights-oriented adjudication, and not clearly modelled on the examples offered by Western court systems, as 'corrupt' or 'abnormal' - as mere transitional irregularities to be got rid of soon, and with the seeming necessity of 'historical development'.

they are much better placed to make impartial judgements, in all the ways judicial independence is traditionally approximated in Western countries.<sup>55</sup> Of only secondary importance, according to this position, is the fact that courts can also build up case practice allowing the further refinement of the principle of treating like cases alike, and allowing for transparency.<sup>56</sup> Only courts can produce decisions on the question of legality, including constitutionality. This provides us with an argument at least for court adjudication of constitutional-rights-based cases. It suggests, too, that courts should be able to engage in some kind of review of legislation: at least, it suggests that there should be some procedural connection between ordinary adjudication and constitutional review, as there is in several continental European jurisdictions with special institutions for constitutional review.

The current practice of adjudication in China provides ample evidence of courts being influenced and put under pressure in their decision-making process. This by itself urges the conclusion that judging rights issues requires independence; if there were no courts and no judges to be influenced or pressurised, would not the situation be worse? Seen this way, there is nothing better for explaining why *courts*, not People's Congresses or branches of government, should adjudicate constitutional rights issues, than looking to see how badly *Chinese* courts work in their present condition of dependency on and exposition to pressure from various institutions, as the next chapter does.

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<sup>55</sup> At a more concrete level, in accordance with the *Administrative Reconsideration Law*, an administrative authority will not only consider the question if someone's right was infringed. It will examine the appropriateness as well as the 'legality' of the decision. In this context that whether an administrative decision should be altered or annulled, does not hinge on whether it has infringed a right.

<sup>56</sup> He Weifang draws attention to this, He Weifang (贺卫方), 'Building up a transparent court (*Jianshe touming fayuan*, 建设透明法院)', *Southern Weekend* (南方周末), 24 August 2003. I think his argument here unnecessarily dismisses the requirement for judges honestly to employ their own convictions about justice and reasonableness.

## **Chapter Eight     Rights protection and judicial strength**

*Courts.* The Constitution provides in Article 126 that the courts enjoy independence in adjudicating cases, stating that they are free from interference by any administrative authority, organisation in society, or individual.<sup>1</sup> But the Constitution also says that of all state organs, the People's Congresses are at the top, above the respective state organs at corresponding level. In practice, not only the People's Congresses but also the Communist Party, branches of government, and the People's Procuracies exercise influence on judicial decisions. This chapter considers the resulting conflict between judicial supervision on the one hand, and judicial independence and strength on the other. It is argued that rights protection requires a disciplined practice of public disagreement in courts as well as strong judges who can make final decisions. For an appropriate understanding of finality we must turn again to jurisprudence, as we also have to, in order to understand the status of disagreement, in the following chapter. In the present context, this amounts to a discussion of the impact of different kinds of procedures: namely, procedures for the supervision of courts and judges, procedures for the influencing of decisions to be made, and procedures for the reversing of judicial decisions. All these procedures relate to the idea of finality of court judgements. Finality of legal decisions is grounded on the assumptions both that judges *should* 'get it right' and that they *can* 'get it wrong.' Attributing finality to court decisions disciplines disagreement by requiring respect for the judicial decision which, although such respect accords formally to any judicial decision regardless of its content, should increase the more persuasive it is.

As has already been mentioned, the People's Congresses are involved in the election and/or appointment of judges. The courts do not only have to submit annual reports to the People's Congresses.<sup>2</sup> They should also accept and answer queries regarding their adjudication work. Further, the members of the Standing Committees of the People's Congresses routinely 'visit and examine'<sup>3</sup> the courts, during which visits the person responsible for the matter under examination is expected to make a report, and 'conscientiously to listen to the criticisms, suggestions and views proffered by the representatives, and make alterations and supply explanations accordingly, based on the principle of 'seeking truth from facts.' The courts are expected to co-operate with the People's Congresses in matters arising from the work of their letters and complaints offices,<sup>4</sup> complying with 'correct' suggestions from the People's Congress, and explaining when and why they do not comply with suggestions that would 'not be in accordance with the facts or the law' - by contrast, in Western countries, it is supposed to be the work of the court, or the individual judge, to establish what the facts and the law are. Most importantly perhaps, the court will also receive 'supervision' regarding specific cases at hand, and is required, even in the context of specific cases, to arrange meetings with representatives from the People's Congresses if necessary, and justify its proceeding in a certain manner.<sup>5</sup> The suggestions regarding specific

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<sup>1</sup> The *Judges Law* says in Article 7 that *judges* (not just courts) are not to be interfered with by these entities in their 'adjudication of cases according to the law.'

<sup>2</sup> The way in which individual courts' responsibility to the National People's Congress moreover bears on court practice can be inferred for instance from the Supreme People's Court's 1998 'Notice on the Supreme People's Court's Views on People's Courts receiving People's Congresses' and their Standing Committees' supervision (*Zuigao renmin fayuan guanyu renmin fayuan jieshou renmin daibiao dahui jiqi changweiyuanhui jiandu de ruogan yijian de tongzhi*, 最高人民法院关于人民法院接受人民代表大会及其常务委员会监督的若干意见的通知), reprinted in the *Judges' Law and complementary provisions* (*Faguanfa jiqi peitao guiding*, 法官法及其配套规定, Beijing: 2001).

<sup>3</sup> *Shicha* (视察).

<sup>4</sup> According to Article 9 of the *Notice*.

<sup>5</sup> Article 5 of the *Notes*.

cases should be 'examined according to the procedure determined by law' and that (only) 'answers' should be provided to the suggestions submitted by members of the People's Congresses. The further problem of 'supervision of individual cases'<sup>6</sup> is addressed below.

Significant further pressure, though not of a kind officially required or recognised, comes from the financial administration. For any money they spend, for instance on salaries, courtrooms, etc., the courts depend directly on the financial departments of the governments at corresponding level.<sup>7</sup> This circumstance is considered to be one of the major factors leading to what is called 'local protectionism' – a bias on the part of courts in favour of local parties to disputes they adjudicate. He Weifang describes the dilemma judges can find themselves in.

'Even if ostensibly we will not practice local protectionism, I must say, as a lowest level court president or even a court president at provincial level – how *can* one not practice local protectionism? The clothing, feeding, housing, transport, social security of a few hundred people [working] in a court all weigh on the court president's shoulders; if the leadership, including the leadership in the administration, the Party, and the People's Congress, think that a judgement favourable to the interests of a local party should be made, then in my eyes it is [not only] very difficult to go against that, [but] indeed he also shouldn't go against it. Because the current system provides that your welfare, your economic existence is in the hands of another.'<sup>8</sup>

Besides the People's Congresses and financial administration, the probably most powerful institutions exercising pressure on the courts (or individual judges) are

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<sup>6</sup> The term for this is *ge'an jian du* (个案监督).

<sup>7</sup> Courts, at least up until recently, were also allowed to retain part of the litigation fees which they collected. This sometimes aggravated the phenomenon of 'local protectionism', because lower level courts might be eager to get permission to adjudicate (would adjudicate) cases for which a higher level court had jurisdiction, in order to get at a share of the fee. Compare Article 23 of the *Administrative Litigation Law* about changing the level at which a case is adjudicated.

the so-called Political and Legal Committees of the Communist Party. They concern themselves with setting up and enforcing guidelines for the work of party members in politics- and law-related areas.<sup>9</sup> Their original function is to co-ordinate the work of the police, procuracies, and courts.<sup>10</sup> The Committees are involved in the work of the court through no formal procedure at all, but they have great influence. It is normal for the president of a court to be a vice president (or president) in the Political and Legal Committee; in this double function he will anyway be likely to 'transmit' the views of the party into the adjudicative process.<sup>11</sup> In a manner similar to that of the representatives from People's Congresses, the Political and Legal Committees will demand specific decisions in certain cases. Their interference is widely considered to be restricted to cases held to be of particular significance.<sup>12</sup> The Political and Legal Committee at national level was rumoured to have interfered after the first 'last instance' decision on the mafia boss Liu Yong, for instance.

Besides ways of influencing decisions to be made by courts, there are also many ways in which court decisions were subjected to challenges and revision. The Chinese court system is a three-tier one, and second instance decisions are

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<sup>8</sup> He Weifang (贺卫方), 'Eight great difficulties with judicial reform (*Sifa gaige de ba da nanti*, 司法改革八大难题), 2001, posted 30 April 2003 at <http://www.legaltheory.com.cn/info.asp?id=3444>.

<sup>9</sup> For a typical report see 'Central Political and Legal Committee emphasises need further to build up the Legal and Political [committee] contingent', dealing with the enforcement of measures against conduct 'contrary to [party] discipline or contrary to law' (*Zhongyang zhengfawei tongzhi qiangdiao: yao jin yi bu jiaqiang zhengfa duiwu jianshe*, 中央政法委通知强调:要进一步加强政法队伍建设) *Sinolaw* of 15 July 2003 at <http://www.law.gov.cn/news/jryw/jryw/715200391018.htm>.

<sup>10</sup> Which during the Cultural Revolution were effectively merged into one organisation.

<sup>11</sup> Often, the president of the Political and Legal Committee is the president of the Police Bureau, and the two vice presidents are the presidents of the People's Procuracy and People's Court respectively.

<sup>12</sup> In Chinese, *zhongda anjian* (重大案件). There is no legislation or other official document that could serve as 'basis' for this practice, but it is entrenched.



‘final’.<sup>13</sup> The chance of a second instance procedure is increased by the fact that the People’s Procuracies as one branch of the organs of ‘administration of justice’<sup>14</sup> are entitled to ‘appeal’, not only in cases of criminal trials where they are the prosecuting authority, but also in civil and administrative litigation (*kangsu*)<sup>15</sup> (Article 69 *Administrative Litigation Law*).<sup>16</sup>

Apart from this mechanism of appeal by the People’s Procuracies, it is also possible to apply to a higher level court to institute a new court procedure or re-trial (*zaishen*),<sup>17</sup> see for instance Article 63 *Administrative Reconsideration Law*. In the context of administrative litigation, a new court procedure can be instituted, simply, when ‘a mistake has been made in the application of the law or regulations:’ in other words, *any* wrong ‘final’ court decision may be subjected to reconsideration in the context of a new court procedure, by decision either of the judicial committee of the same court, or of a higher ranking court, according to Article 63 of the *Administrative Litigation Law*.

Neither according to the law just cited, nor in court practice do there appear to be further restrictions, beyond time limitations. A *Guide to Application for Re-trial* issued by the Chengdu City Intermediate Court says that the application for re-trial must occur within two years of the original judgement becoming binding.<sup>18</sup> There is not, apparently, any provision exempting such cases from the re-trial procedure, in which altering the judgement would frustrate legitimate

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<sup>13</sup> Notwithstanding problems with the finality of court decisions.

<sup>14</sup> *Sifa jiguan*, 司法机关.

<sup>15</sup> In Chinese, *kangsu* (抗诉).

<sup>16</sup> The ‘procuracy’ in Russia and in the former Soviet Union had a similar function. For a discussion see Yang Lixin 杨立新, ‘Procuratorial Supervision over Civil and Administration Procedures and Judicial Justice (*Minshi xingzheng susong jiancha jiandu yu sifa gongzheng*, 民事行政诉送检查监督与司法公正)’ (2000) *Faxue Yanjiu* vol. 4 p. 45.

<sup>17</sup> *Zaishen* (再审).

expectations of legal certainty on the part of citizens, especially the parties of the case. Therefore, while in one sense the re-trial mechanism may help to protect rights; to restore justice, it can also endanger it. The purpose of re-trial at least in cases in which a legitimate expectation of having reached a final decision is disappointed, can only be correctness 'for correctness's sake;' it cannot be the protection of legal rights.<sup>19</sup>

Complementing appeals and (application for) retrial, there is a further, broader application mechanism which can be addressed either to the People's Procuracy or to a higher level court. People can apply to these institutions so that they initiate a retrial, by filing a different kind of 'appeal' (*shensu*).<sup>20</sup> It is hardly necessary to mention that there may also be petitions or letters written to other authorities, such as the People's Congress, which are originally not directly involved in the court procedure, but which as we have seen, have considerable influence on the courts, for instance in the context of 'supervision of individual cases'.<sup>21</sup> Two Henan local court judges writing about the special problem of *shangfang*, letters and complaints visits, to the courts, could not be more vociferous about this phenomenon at the present time. Their main observation is that at present letters and complaints visits paid to courts, often 'making use of public holidays' or of 'coming in groups', are aimed at 'overturning legally effective decisions' of the courts, and that because of the form of letters and complaints visits, the principle on which these complaints are dealt with is to handle those that complain most vociferously, but not others. This, they conclude,

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<sup>18</sup> *Chengdu City Intermediate Court*, 'Guide to Litigation - How to Apply for a re-trial (*Susong zhinan zhishi* - *shenqing zaishen*, 诉讼指南知识----申请再审)', obtained on 8 September 2003. No reference is made to the legal basis of this limitation.

<sup>19</sup> In Chinese, a frequently used expression for this is *jiuzheng cuowu* (纠正错误).

<sup>20</sup> *Shensu* (申诉).

<sup>21</sup> Such petitions should be called *shenqing* (申请).

is unbearable, even though they readily concede that citizens have a *right* to complain through the letters and complaints procedure.<sup>22</sup>

Because of the large number of mechanisms available for reconsidering a final judgement, court decisions in China lack the certainty which an entrenched principle of finality could provide. This lessens the weight of an individual court's judgement. The fact that a judgement was wrong, will easily trigger re-trials, even in the case of a 'final' judgement, in the supposed effort to ensure just (correct) results. The many possibilities of re-opening a trial or litigation can counteract efforts 'strictly' to ensure that the law is applied in the right way, when these mechanisms are abused to circumvent the law. But even though some bad effects of the extensive use of re-trial mechanisms, and of interference with the work of courts, are obvious, it is not so clear, especially not to those involved in actual court cases, what precisely is wrong about such interference or re-trials, at least in those cases in which they genuinely have the aim of *correcting mistakes*. This is all the more important in the context of real power hierarchies apparently set up by the constitution itself, especially the supposed supremacy of People's Congresses.

It is important to appreciate that we are here faced with a real choice: arranging for court decisions to be final of course means to accept that there can be wrong final decisions; arranging for rights issues to be argued controversially means to accept sustained disagreement, that will in many situations leave one party (at least) with the feeling that the final decision was wrong. But the choice

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<sup>22</sup> Ding Xiuzhi, Zhang Zhiwei (丁秀枝, 张志伟), 'Our view on perfecting the letters and complaints system in courts (*Wanshan fayuan xinfang zhidu zhiwojian*, 完善法院信访制度之我见)', 31 March 2004, at <http://www.chinacourt.org/public/detail.php?id=109647>.

is not between two kinds of commitment: a commitment to protecting rights, and a commitment to ensuring right decisions. For protecting rights implies a commitment to ensuring right decisions; only the logic of rights also blocks wrong decisions from being reconsidered again and again, precisely because the perspective of the rights bearers in a dispute has become so important, and potentially indefinite reconsideration would violate the right to a right decision, even if the actual decision made in a particular, concrete case was wrong: The putative (ideal) rightness of the decision to which one has a right, cannot be used to weaken or narrow the right *to a decision*. There are exceptions (as when terrible injustice has been done), but these must be principled: there can be no general instruction to repeat a court decision procedure, on the mere ground that 'the law was applied wrongly.' Rights-centred adjudication, in short, does not allow for endless consideration of what should, all things considered, be done.<sup>23</sup>

This suggests that if it is based on the idea that final but wrong court decisions *must be* corrected, some of the currently ongoing supervision of courts cannot be integral parts of the legal order under the Chinese Constitution. They express a view opposed to that of rights protection within contemporary Chinese constitutional practice, albeit a view for which one can find some 'textual basis' (to use a deliberately vague phrase) in the Constitution, and which is expressed in the practice supposedly built on the Constitution. Situations where the text of a Constitution appears to harbour contradictions, are not infrequent, in any constitution; they all the more illustrate the need for constitutional interpretation

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<sup>23</sup> Several of Nanping Liu's works have addressed the problem of finality in Chinese court practice; see, for instance, his 'A Vulnerable Justice: Finality of Civil Judgements in China', (2000) 13 *Columbia Journal of Asian Law* 35. There he attributes a 'different concept of finality' to the Chinese, in a move perhaps similar to Clarke's approach to *shenpanyuan* discussed in Chapter One. Liu also argues that the finality of court judgements is a not really much-discussed

and the application of constitutional principles; they make clearer that the text of a constitution does not by itself tell us what the constitutional law is on a certain point. The logic of final court decisions only holds if courts at particular instances do, indeed, decide for themselves. Otherwise, there would be no point in having several instances in the first place. The assumption underlying this practice obviously cannot be that the higher instance court always gets it right:<sup>24</sup> why not, otherwise, technically abolish lower instances by bringing them up to the level of the higher instance? To use Lubman's phrase, such a set-up would indeed make courts resemble administrative institutions, with junior staff handling incoming cases but under direction and supervision of their senior superiors. In observing as much we have already begun to interpret *judicial* independence, understood as the concept that captures what individual judges are supposed to do when judging cases.

*Judges.* Perhaps, above, we had some hesitation in considering and criticising the lack of financial independence of courts in China: for after all, there always will be a need for courts to get money from somewhere, without actually imposing and collecting taxes themselves, or living entirely on litigation fees they collect.<sup>25</sup>

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issue within China; perhaps this is because of the strength of the attitude which I have here characterised as an attitude of supervision, and correcting 'for correctness's sake'.

<sup>24</sup> This is perhaps an important point to make, given that some of those who now plead, with some excellent arguments, for a reduction of external supervision of the courts, insist that 'there is already enough legal [internal] supervision' of the courts, for 'if there has been a mistake, the second instance court will generally correct it, and if the judgement has already become legally effective, then the higher-ranking court can still decide to try it again by the *tiqu* procedure.' Han Zhe (韩哲), 'The dividing line between court independence and the power of the People's Congresses to supervise (*Fayuan duli shenpanquan he renda jianduquan de bianjie*, 法院独立审判权和人大监督权的边界), 20 November 2003 21<sup>st</sup> Century Herald Tribune (21 世纪经济报道) <http://www.nanfangdaily.com.cn/jj/20031120/jd/200311190598.asp>

<sup>25</sup> It is also of interest to note that the area of commercial law, relatively successful arbitration services are by some seen as competitors to courts, taking 'lucrative' cases away from them. Class on Arbitration Law (仲裁法) to European participants of the EU-China Legal and Judicial Co-

Courts are always in some ways dependent on other institutions. Considering the situation of individual judges in China will allow us to turn from a discussion of adjudicative finality and institutional judicial independence, to a situation in which the question of independence presents itself more clearly, because it can be related directly to the requirement of judicial impartiality as a personal virtue. We may usefully talk about judicial ‘strength’, as what enables a judge to judge impartially, or in a way that respects others as equals, or shows awareness of ‘alterity’.<sup>26</sup> An individual judge working, say, in a local (lowest level) court, will have been appointed, and can be dismissed by the president of the court where he works, upon approval of the local People’s Congress to whom appointment requests or suggestions have to be submitted (Article eleven of the *Judges’ Law*). The court president himself has been elected by the People’s Congress at corresponding level and can be dismissed by it, too. Reasons for dismissing judges are mentioned in the *Judges’ Law*; the enumeration includes ‘being considered incompetent for the post’ and ‘other circumstances that call for removal from the post (Article thirteen).’ Removal of judges is indeed comparatively frequent.<sup>27</sup> Many judges in China abandon their jobs of their own accord, preferring to work as academics or as lawyers. This by itself could be read as an indication of how uncomfortable their situation is overall.

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operation Programme, June 2003, by Wang Changsheng (王长生), on the role of the China International Economic and Trade Arbitration Commission (hereafter, CIETAC).

<sup>26</sup> In Wiggins’s terms. See above, Chapter 3.

<sup>27</sup> So for instance, in the recent case in the Luoyang City court, already mentioned in Chapter Seven. The judge was threatened with removal when she wrote in a judgement that a certain regulation on the pricing of seeds was not to be applied, because it contravened the higher ranking law made by the NPC’s Standing Committee on the same matter. See Chapter 7 as well as an instructive account of this case, ‘Luoyang City “Seed” Case Highlights Chinese Courts’ Lack of Authority to Declare Laws Invalid’, (2004) *China Law and Governance Review* Issue no.4. at [www.chinareview.info](http://www.chinareview.info).

The judge's chief duty, in the words of the *Judges' Law*, is 'strictly to respect the constitution and the law,'<sup>28</sup> and 'to take facts as the basis, and laws as the criterion when trying cases, to handle cases impartially, and not to bend law for personal gain' (Article 7). Article 8 of the *Judges' Law* stipulates that the judges have the 'right' that their adjudication of individual cases be not 'interfered with' by administrative authorities, by groups in society or by individuals. As we know that the administration and the legislature as well as the party do indeed take influence on the way judges decide, even the way they decide individual cases, we can only try to understand 'the court' as something different from 'the judges', to try and make the rules on judicial supervision and on judicial independence cohere. But how far is this possible?

There are arguments for the supervision of individual judges, which to many appear to be strong enough arguments to dismiss qualms about personal judicial independence. When China began its legal reforms after the Cultural Revolution, few judges<sup>29</sup> were still left over from before the Cultural Revolution, and those that were newly recruited tended to have a poor educational background. This problem has been hampering the development of the Chinese judiciary over the past twenty years, and it still has not been resolved. Just to illustrate, many Chinese judges formerly served in the People's Liberation Army and were transferred to courts as an alternative to being made altogether redundant. They received very little legal education. Many Chinese people's reaction to this fact<sup>30</sup> is to demand that judges be supervised, controlled, and

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<sup>28</sup> Article two requires that they loyally 'carry out' (*zhongshi zhixing*, 忠实执行) the Constitution and the law (laws).

<sup>29</sup> During the Cultural Revolution judges were branded as rightists and suffered persecution, as related e.g. in Lubman, *Bird in a Cage*, at p. 101 and passim.

<sup>30</sup> For an interesting recent account of the situation especially of courts in remote places, see Guo Guosong (郭国松), 'Remote courts: resources lacking within, rescuing forces lacking without

improved. There is a lot of talk about the 'quality' of judges, and many appear to blame a lack of 'quality' for nearly all the failures of the Chinese judicial system.<sup>31</sup> This has found expression in a variety of mechanisms and institutions for internal supervision of individual judges.

The judicial or adjudication committee<sup>32</sup> consists of the court president and the presiding judges of the divisions of the court. Individual judges adjudicating a case are obligated to submit all 'major' cases to the so-called judiciary committees set up within every court. The committee is also itself entitled to take on cases, and is involved in the re-trial decision e.g. according to Article 62 of the *Administrative Litigation Law*. When it 'takes on' a case, this means that the committee members look at the file of the case, and discuss what the decision should be like. This leads to a situation described in Chinese as 'those who try, do not decide, and those who decide, have not tried the case'.<sup>33</sup>

In connection with the judicial committees, secondly, it should be mentioned that the president of a court, given his power to appoint and dismiss (see above), and his function in the judicial committee, is a figure of particular importance for an individual judge, in whose person a lot of power is concentrated. In addition to this, some courts today have 'supervision chambers'

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(*Bianyuan fayuan: nei que liangcao, wai que jiu bing*, 边远法院：内缺粮草，外缺救兵)', *Southern Weekend* (南方周末) of 21 August 2003, at <http://www.nanfangdaily.com.cn/zm/20030821/xw/shxw/200308210924.asp>. Incidentally this Article points out a case in which (absurdly) the employment of judges in quite remote places, too, is made dependent on the applicants' having the local household registration.

<sup>31</sup> Not to say that lack of professionalism is not a serious problem. See e.g. the discussion in Peerenboom, *China's Long march Toward the Rule of Law*, pp. 289 ff.

<sup>32</sup> *Shenpan weiyuanhui* (审判委员会).

<sup>33</sup> *Shen er bu pan, pan er bu shen* (审而不判，判而不审). Note that one of the points on the agendas of the 1848 revolutions in several European countries was that court procedures (trials) should be public and oral, and that decisions on merely documentary basis should be abolished.



charged with considering judgements by the other chambers alleged to be wrong, and 'research offices' whose tasks include supervision.<sup>34</sup>

Imagine a judge tries to resist a suggestion made by the judicial committee, and decide a case simply the way he thinks right, regardless of what is suggested to him. What does he come up against? The already mentioned pressures have been further institutionalised through disciplinary, evaluation and grading mechanisms, some of whose main features are outlined in the following. If we take up a current edition of the *Judges' Law and Complementary Regulations*<sup>35</sup> we will find, for instance, that it includes the 1997 *Notes on the Publication of the 'Provisional Regulations on the Grading of Judges'*, published jointly by the Communist Party's organisational and personnel department and the Supreme People's Court, the 1998 *Directives for the Handling of Violations of Discipline*<sup>36</sup> in Adjudication and complementing these, the Supreme People's Court's 1998 *Directives for the Centre Handling Reports on Judges Having Contravened the Law or Contravened Professional Discipline*, the Supreme People's Court's 1998 *Notes on the Publication of the Trial Version of the 'Directives for Holding Adjudicators who Adjudicate Unlawfully Responsible'*, the Supreme People's Court's 1998 trial version of *Directives on Disciplinary Sanctions in Adjudication (Trial Version)*, its 2000 *Explanations on Certain Problems of Determining and Fine-tuning the Grading of Judges'*, and its 2001 *Basic Principles of Judicial Ethics*.<sup>37</sup> Besides these, some of the provisions of the *Judges' Law* itself are

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<sup>34</sup> By contrast, the fact that court procedures are not exclusively but frequently handled by panels of judges, may be a way of improving rather than hampering just outcomes. The voice of the presiding judge on a panel carries the same weight as that of the other judges. Note that in administrative litigation, according to Article ten of the *Administrative Litigation Law*, there are only panel decisions.

<sup>35</sup> *Faguanfa jiqi peitao guiding* (法官法及其配套规定, Beijing:2001).

<sup>36</sup> *Jilü* (纪律) can refer to Party and/or professional discipline requirements.

<sup>37</sup> These include avoiding undue contact with parties – and compliance with this requirement, too, is supposed to be supervised. In an Article published in June 2003 in *Southern Weekend*, He

concerned with evaluating, disciplining and sanctioning judges. The Supreme People's Court in 2003 issued new *Rules for Strictly Enforcing the Sanctions System of the Judges' Law*,<sup>38</sup> and in 2004 there were reports that it was working on a new system of 'financial pledges, penalties and incentives' to ensure judicial integrity.<sup>39</sup> There seems to be a continuous stream of regulations sanctioning judicial conduct.

Firstly as to the disciplining and punishment of judges, in Article 32 of the *Judges Law*, reprehensible forms of conduct of judges are listed, and as the eighth among these we find 'the neglect of one's official duties, if it leads to a wrong[ly decided] case, or to significant losses for any of the parties'. Such reprehensible conduct is to be met with by sanctions of graduated severity: an official reprimand, [the verdict of having committed a] 'disciplinary offence' or a 'great disciplinary offence', down-grading, the suspension from office,<sup>40</sup> and dismissal (Article 34). The 1998 Supreme People's Court's *Notes on the publication of the trial version of the 'Directions for Holding Adjudicators who Adjudicate Unlawfully Responsible'* also refer to 'wrong decisions', as decisions in which 'one has intentionally contravened the facts [sic] or the law', or in which as a consequence

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Weifang comments on a new system of supervision introduced recently by a court in Chongqing, which involves the spouses of judges based on a 'responsibility declaration' to be signed by them. The spouses were asked to keep records of whom their partner was meeting with, with whom he was eating out, which restaurants he went to, and who paid the bill. They had to report at regular intervals to the supervision organs of the court, namely, the president of the court and the head of the court's own 'discipline and investigation group'. If they performed well, they were to be praised and [their spouses] given bonuses; if they performed badly, they were to 'take joint responsibility' [with the judge in question; presumably this means that the judges whose spouse has failed would face sanctions]. He Weifang 'Supervision has arrived at home (*Jiandu dao jia le*, 监督到家了), *Southern Weekend* (南方周末) of 19 June 2003, at <http://www.nanfangdaily.com.cn/zm/20030619/xw/shxw/200306191111.asp>.

<sup>38</sup> Cui Li (崔丽) *Guanyu yange zhixing "zhonghua renmin gongheguo faguanfa" youguan chengjie zhidu de ruogan guiding*, 关于严格执行“中华人民共和国法官法”有关惩戒制度的若干规定), published by the Court 19 June 2003.

<sup>39</sup> 'Supreme People's Court says that in courts with sufficient [economic] conditions one can run a system of financial pledges to ensure [judicial] integrity (*Gaofa biaooshi: you tiaojian de fayuan ke shixing qianzheng baozheng jin zhidu*, 高法表示：有条件的法院可试行廉政保证金制度 [http://news.xinhuanet.com/legal/2004-04/09/content\\_1409209.htm](http://news.xinhuanet.com/legal/2004-04/09/content_1409209.htm)).

of grave negligence, a wrong judgement has been produced and this leads to a 'grave result'.

The reference to intentionally wrong decisions and negligently wrong decisions is at best confusing. The point of 'intentionally wrong' must be that a judge knew that the law was other than he claimed it was, and a 'negligently wrong' decision must mean that the judge ought to have known that the law was different from what he claimed it was – this seems to be the best sense we can impute to these provisions. But on the one hand, it seems that a judge 'ought to' know anyway what the law is. Or is there an imaginable situation in which we could say, 'the law actually was such and such, but the judge need not know it?'<sup>41</sup> There may, indeed, be contexts in which this formulation can be used to express that the judge should – or shouldn't - be excused for having erred.<sup>42</sup> It may be considered negligent of a judge to overlook a statute – but the important legal question in such a case is usually the question whether this made the decision wrong, even if the judge was 'guilty' of negligence. It would be difficult to say, too, that a judge was negligent whenever he opted for the wrong side of a disagreement about what the law is. Negligence of the judge is not itself a criterion for the incorrectness of a decision, its significance for the parties affected by it, or the decision's significance for how law will be interpreted in later instances.<sup>43</sup> An intentional mistake of law on the part of a judge may also be difficult to distinguish from an 'honest and sincere' interpretation of the law

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<sup>40</sup> The expression used is *chezhi* (撤职).

<sup>41</sup> The idea of negligence requires a conception of due care.

<sup>42</sup> Indeed, in the context of Chinese law especially, with its great number of ever more specific and more local regulations of all kinds, judges will perhaps have to be 'forgiven' quite often for not knowing one or another regulation.

<sup>43</sup> Both common law and European 'continental' law judicial practice rely very much on this function of previous decisions, though using it in different ways.

which simply differed from the one favoured by those assessing his 'error'. This raises the question who should judge judges, and by what standards.

We have already observed a similar attitude towards mistakes on the part of officials, above, in the context of the various forms of administrative supervision. This rejects the assumption, implicit in a multiple-tier judiciary system, that *any* judge can get it wrong (see just above).<sup>44</sup> It also superimposes a new function on the process of adjudication – by regarding it primarily as a form of official conduct whose correctness, like that of administrative measures and decisions, has to be ensured 'for correctness's sake.' This is not to deny that individual judges require to be judged, sometimes – when they commit a crime, for instance, or indeed when they do grossly counteract the requirements of their office. But in order to forestall the abovementioned threats to judicial independence, the 'judging of *the judging* of judges' – of the actual process of adjudicating individual cases - should occur in a set-up different from personal supervision. Trust in the capability of a supervision and disciplining system for an improvement of adjudication, is fatally misplaced trust, at least when the aim of adjudication is taken to be good judiciary decisions, rather than the education of judges for its own sake or a confirmation of the principle that mistakes are 'followed up'. This particular take on judicial 'mistakes', 'intentional' and 'negligent misapplication' of the law is not accidental: it reinforces what has been said about the principles operating against effective rights protection through final court judgements in the previous section of this chapter, at the level of individual officials. Judges who will be punished, effectively, for disagreeing with higher-ranking superiors, will be considerably weakened in their sense of

responsibility for *the parties*' right to a right decision: their sense of obligation will be more toward their superiors (more than is perhaps unavoidable in a system of human hierarchies).

Apart from the system for judicial supervision, there are mechanisms for the assessment and grading of judges in place, which also weaken the ability of judges to work independently. The 'assessment and approval'<sup>45</sup> system is required according to the *Judges' Law*, and results in annual work reports on the judge. This examination is to be held 'within the respective court's structure' (Article 21), and is to be based on the 'actual work performance, the virtuousness of the judge's thinking, the skill and theoretical understanding displayed in his decisions, the work attitude and work method [style] of the judge' (Article 23). The assessment system also leads to judges being put into three categories: 'outstanding', 'satisfactory [satisfying the requirements of the office]', and 'not satisfactory' (Article 24). The assessment influences whether they receive rewards or sanctions, whether they undergo training, whether they are dismissed or suspended from office, and, finally, their salary (Article 24).

Beyond 'assessment and approval', there is also a grading system for judges. The grading is also entrenched in the 1995 *Judges Law*, whose Articles 18 to 20 require that each judge be subjected to a yearly appraisal according to a scale of twelve different grades. The highest grade is held by the president of the Supreme People's Court alone. The remaining eleven grades influence what position one can hold but are to be awarded not as a consequence or expression of one's ranking in the court hierarchy, but according to the tasks that were assigned

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<sup>44</sup> A mere argument from efficiency would not do, at least if it were possible to train a great number of people up to the standards of the respective highest court, at lesser expense than incurred by setting up several court instances.

<sup>45</sup> *Kaohe* (考核).

to the judges, how they performed in terms of their morals and ability, the quality of their work output, their work efficiency (number of cases handled) and the number of years they have worked.<sup>46</sup> A more rough-scale grading is superimposed on the twelve grades, ranging from 'great judge' to 'high-grade judge' and 'judge'. The two above-mentioned 1997 *Notes on the provisional regulations for the grading of judges* and the Supreme People's Court's 2000 *Answer regarding certain questions about the evaluation of judges and the adjustment of such evaluation* further refine this system, for instance by specifying that the vice president of the Supreme People's Court has to be a first or second grade 'great judge', and that as a judicial assistant at the local court level (the lowest adjudicator possible) one is a mere grade three to grade five 'judge'. The *Notes* also introduce a system of semi-automatic ascendance to higher grades according to time of service.<sup>47</sup>

Eagerness to avoid making judgements which are later overturned is a familiar phenomenon in all court systems, but in China, for the reasons discussed just above, it is particularly pronounced.<sup>48</sup> Apart from pressure directly on how they decide, there is also considerable pressure on judges to decide quickly (and this, too, is of course the case in many other legal systems).<sup>49</sup> The judicial system

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<sup>46</sup> The criteria listed are in Chinese, *faguan suo ren zhiwu, decai biao xian, yewu shuiping, shen pangongzuo de gongzuo nianxian* (法官所任职务, 德才表现, 业务水平, 审判工作的工作年限), according to Article 19 of the *Judges Law*.

<sup>47</sup> On condition that one does not perform badly in any of the above mentioned areas, in Articles twelve to sixteen. Article eleven says that the president, vice president etc. down to the judicial assistants participate in the evaluation [meetings, held at each court], but Article ten specifies that the president of the respective higher level court has to approve of each grading.

<sup>48</sup> No bonuses will be given to judges with 'too many' wrong judgements, but because of the low salaries for judges, especially in poor provinces, the 'scrapping of bonuses' (扣奖金) is a considerable economic threat. Bonuses are also awarded, for instance, on the basis of efficiency in concluding cases (结案).

<sup>49</sup> Compare an Article on a Beijing court's effort to improve efficiency by demanding judges to put in extra hours, and threatening not to consider them for distinctions if they failed to conclude the cases they were assigned within the time prescribed by law for the conclusion of cases. 'Particular attention was given to criminal cases' in this context. See *Xinhua* wang, 'In Beijing [judges] work overtime to clear away cases that are over the time limit set for handling, judges

currently in place provides mechanisms whereby judges can try to ensure compliance with what their superiors think: there are not only the judicial interpretations, ranging from law-like sets of rules issued by the Court down to specific directions on how to adjudicate a certain case, by the Supreme People's Court. There is also an entrenched system of 'asking for instruction' by *any* higher ranking court.<sup>50</sup>

One might still think that the relationship between lower and higher level courts created by these mechanisms is in effect not very different from those in Western countries, be they Common-Law- or Continental-Law-dominated. In Western legal systems, hierarchical pressures might simply be more concealed, and juridical decisions will in any way refer to previous decisions by higher courts. But this already suggests a great difference. The reference by a judge to a previous decision by a Common Law or Continental court is a reference to a text to be interpreted by that judge; by contrast, the reference to a higher level court is the reference of a decision to a person, or several persons, who has some measure of power over oneself.<sup>51</sup> The reference to another person is more like asking for a command, a directive, to do this or that; the command will be correspondingly concise. It reflects only power as power can be expressed in a hierarchy, but not judicial strength, as it could be attributed to an individual judge. Reference to a previous decision, or reference to a rule provided by legislation,<sup>52</sup> involves some

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who cannot cope will not receive approval [praise] (*Beijing jiaban qingli chaoshenxian anjian, qingli bu li faguan bu yu pingyou*, 北京加班清理超审限案件 清理不力法官不予评优), 21 October 2003 at [http://news.xinhuanet.com/legal/2003-10/21/content\\_1133800.htm](http://news.xinhuanet.com/legal/2003-10/21/content_1133800.htm).

<sup>50</sup> This procedure is called *qingshi* (请示).

<sup>51</sup> Further problems are that sometimes parts of an item of legislation which it would be difficult to get through the NPC is left out in the NPC legislation, but then put in immediately after promulgation of the new law, in the shape of a judicial interpretation previously agreed on by the legislation-drafting branch of government (often a ministry) and the Supreme People's Court.

<sup>52</sup> Variances in the way decisions are written should not obscure the fact that legal practice in Civil European jurisdictions always involves a body of commentaries aiding this interpretation process, even if, as for instance in France, court decisions themselves do not state many reasons.

kind of interpretation which, as suggested previously, must be tested against the venerable test of universalisability, or made against a background assumption of equality, properly understood.<sup>53</sup> The form which many (if not most) judgements by Chinese courts take to date, reflects that there is no perceived need for stating reasons; it reflects more of a 'command' conception of adjudication, than one of 'considered judgement'.<sup>54</sup> If courts did not so frequently resort to the mechanism of requesting to be told how to decide by higher order judges; and if the *Judges' Law*, instead of merely requiring that courts and judges be not interfered with by any administrative organ or any group in society, also protected individual judges from interference by their own superiors, this would probably be different.<sup>55</sup>

In the previous chapter we saw that one important objection to the 'judicialisation' of the constitution was that the constitution was too abstract to get any specific answers out of it, when deciding actual cases. But it is the stifling of judicial practice through supervision and interference which presents an obstacle to working out what the abstract words of a constitution, or indeed of any lower level ordinary law or legislation, mean. There is no incentive, nor is there much opportunity, for individual judge's creativity and sense of responsibility to go into proper, considered judgements.<sup>56</sup>

There are many efforts under way to improve this situation. There is wide academic discussion, for instance, of how to create a system in which precedent decisions play some kind role, and individual courts, notably the Supreme

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<sup>53</sup> See third chapter on universality, publicity, equality and *shu* (恕).

<sup>54</sup> Of course, this is not to say that reference to previous court judgements does not occur at all – but until now it appears not to be open; up to now one does not see previous decisions cited in new decisions, for instance.

<sup>55</sup> By contrast, on this interpretation, abstract and legislation-like judicial interpretations only reduce judges' ability to judge if they are in contradiction with specific legislation.

<sup>56</sup> And for building up a body of precedent decisions to be consulted by other judges later.



People's Court, make compilations of case decisions to be used by judges.<sup>57</sup> The discussion whether this means that China is moving toward a 'case law' system, and whether this is justified given that it has a 'continental' legal system, seems to accentuate differences in the wrong way. For in its current wide neglect of previous court practice, the Chinese system resembles neither traditional continental legal systems such as the French or German one, nor the Anglo-American system. Both Common Law and continental systems rely heavily on the instruction to be gained from previous, specific decisions of cases, and because several of the institutions and practices discussed above, such as judicial interpretations, the easy availability of re-trials, and certain forms of 'judicial supervision' are not common in either.

*Recent development in the relationship of the Courts and People's Congresses: constitutional review by the NPC Standing Committee?* Above, it seemed that due to its current extension of 'legislative' power to People's Congresses at various levels and to a large number of government authorities, and because of the near-absence of any distribution of legislative power according to federal or functional (separation of powers) principles, China's 'real' law could be limited to those principles of the Chinese constitution which truly embodied the spirit of the rule of law. If there are no real 'laws', why talk about constitutional or judicial review? The premise of this question is exaggerated. But still, by posing this question, we can draw attention to real difficulties with constitutional review in China. Not only do legal norms lack justification from democratic procedures. Chinese laws, regulations and rules of their various provenances also appear

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<sup>57</sup> Compare for instance the contributions available on the website <http://www.chinalegaltheory.com>.

virtually calculated to be inconsistent with each other. The only available justification for the current system of ‘extension’ rather than ‘distribution’ of legislative power is local state authorities’ greater proximity to and better acquaintance with local conditions, but as observed above, this justification could be read as the concession that consistency of principle (coherence) cannot be achieved – that circumstance-specific decisions are more important than principled decisions. Then a constitution (‘constitutionalism’) would appear to be in fundamental contradiction with the pattern of Chinese government, based on as local and specific rules and commands as possible. In institutional terms, one might say that this contradiction reflects a claim to supremacy of People’s Congresses, which due to the peculiar take on the idea of laws and ‘normative documents’ is quite special to China, even though in countries where there is a supposed supremacy of parliament, similar discussions arise.

But the juxtaposition of circumstance-specific and principled decisions is simplistic. Rule-following and adherence to principles are instantiated in specific circumstances. This is why equality has such paramount importance as a legal principle. Formulae such as ‘if a then do b, *ceteris paribus*’ as a model for law are treacherously slippery,<sup>58</sup> and one way of addressing this problem is by working out how conditions of equality can be achieved in each instance. An important inherent justification for laws is that they can best fulfil the requirement of equality – of minimal or to put it in a better way, of only principled differentiation.<sup>59</sup> ‘Administrative regulation’ and the extension of

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<sup>58</sup> See already the discussion of what it means, and how important it is, to treat like cases alike and of complementing principles of equality or justice, in the second and third chapter.

<sup>59</sup> For a discussion of the implications of the constitutional equality requirement for principles of legislation in China, see also the chapter of this title in Zhou Wei (editor, 周伟), *Study on the Judicial Protection of Constitutional Rights* (*Xianfa jiben quanli sifa jiuji yanjiu*, 宪法基本权利司法救济研究, Beijing: 2003).

legislative power to a great number of state authorities, by contrast, encourage arbitrariness.<sup>60</sup> The review of political (legislative) and administrative (including legislative) decisions in accordance with constitutional principles is not less but more required: because of the badness of legislation, in some ways particularly at local levels, legal practice should all the more rely on such principles.

On 14 May 2003, as mentioned in Chapter Five, three legal scholars in Beijing submitted a ‘suggestion letter’ on the *Directions for internment and deportation of tramps and beggars in cities* to the Standing Committee of the National People’s Congress, arguing that the *Directions* infringed the Constitution’s right to personal freedom,<sup>61</sup> the *Administrative Punishment Law*, and the *Legislation Law*,<sup>62</sup> in the ways already discussed above. There was no telling when, or indeed if, the suggestion would be answered, but the subsequent abolition of the internment and deportation measure, and their replacement with a new regulation, made this question disappear. In the following, the independent merits of the new petitioning procedure under the *Legislation Law* are considered.

The procedure for submission according to Article 90 of the 2000 *Legislation Law* recalls the principles underlying the *bei'an* or filing procedure of submitting new legislation to higher authorities. In particular it recalls to mind the principle that the Standing Committees of People’s Congresses at central and local levels can in certain cases annul or alter corresponding level government regulations (Article 88 *Legislation Law*), as well as lower level People’s

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<sup>60</sup> Symptomatic for this is the differentiation between so called ‘abstract’ and so-called ‘specific’ administrative acts.

<sup>61</sup> The right to personal freedom is mentioned not only in Article 37 of the 1982/ 1999 *Constitution* but also in the 1986 *General Principles of Civil Law*.

<sup>62</sup> See the Article on this petition by Zhao Xiang (赵翔) and Wan Xuezhong (万学忠), ‘Three citizens suggest a review of the ‘internment law [sic], and experts enthusiastically affirm [the appropriateness of suggestion] (*San Gongmin jianyi shencha “shourongfa”, youguan zhuanjia jiyu jiji kending*, 三公民建议审查《收容法》有关专家给予积极肯定), *Legal Daily* (法制日), 18 May 2003.

Congresses' regulations.<sup>63</sup> But there are also important differences. For not only do certain designated authorities such as the State Council have the right to submit 'requests' for a review of administrative regulations and local regulations as to whether they conform with the laws and the constitution.<sup>64</sup> But also private individuals may submit 'suggestions' to the NPC Standing Committee.

'Requests' submitted by specially entitled institutions *must be answered* within two months. The organisations entitled to submit are the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuracy and the Standing Committees of the People's Congresses of the provinces, autonomous regions and directly administered cities. The inclusion of the Supreme People's Court shows, yet again, that courts, at least the Supreme People's Court, may indeed 'interpret' the Constitution. The Supreme People's Court could be asked to submit questions of constitutionality to the Standing Committee by lower ranking courts, for instance through the 'asking for instructions' procedure mentioned above. So there is a kind of procedure for 'constitutional review', even though it is limited to administrative and local regulations, laws remaining unreviewable.

While 'suggestions from ordinary people must be *received and considered*,<sup>65</sup> they need not actually be responded to or 'handled' in the sense of a strict requirement to do so.<sup>66</sup> According to oral information received from scholars there have been thousands of 'suggestions' per year, but there appears to have been only one case, by the end of 2003, in which one of the authorities

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<sup>63</sup> Also, People's Congresses can alter or annul their own Standing Committees' laws/regulations, according to Article 88 *Legislation Law*.

<sup>64</sup> That is, *xingzheng fagui*, *difangxing fagui*, *zizhitiaoli* and *danxing tiaoli* (行政法规, 地方性法规, 自治条例, 单行条例).

<sup>65</sup> *Shouli*, 受理.

<sup>66</sup> *Chuli*, 处理.

privileged to make 'requests' for review has actually made use of its privilege. Since there is no publicity requirement for the review procedure, however, these data are uncertain. The one known case of review upon 'request' had then not yet been 'decided'.<sup>67</sup>

Whether it comes in the form of a request or of a suggestion, an issue under review is first handled by one of the so called 'work commissions' of the NPC's Standing Committee. The work committee produces a suggestion which, having been passed under the eyes of the Standing Committee's First Secretary, is passed on to one of the so-called 'Special Committees' of the NPC's Standing Committee, of which there are nine altogether. In relatively simple or uncontroversial cases, an assessment that the regulation in question is unconstitutional *or* contravenes higher ranking law will lead to an informal request to the authority which made it, to alter or amend or revoke it accordingly.<sup>68</sup> In complicated cases, several of these Special Committees, including the Law Committee, may be convened for an extensive discussion of the problem. If this happens, then the NPC's Standing Committee will usually invite the institution that issued the regulation under review to 'defend' it. In such cases the review procedure assumes a somewhat forensic format,<sup>69</sup> but crucially, as has been pointed out by Wang Zhenmin, only the defendant is allowed to appear and make its case.<sup>70</sup>

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<sup>67</sup> Wang Zhenmin's 王振民 LL.M. class on constitutional law 宪法学 at Tsinghua Law School Beijing, 30 September 2003.

<sup>68</sup> Article 91 of the *Legislation Law* says that it *may* submit a written suggestion, but it appears that normally, this request is made in the form of a mere phone call.

<sup>69</sup> The 'decision' taken in such a case also has to be put in written form.

<sup>70</sup> Nor are lawyers allowed to represent either of the 'parties'. Wang Zhenmin, *ibid* (above note 66).

The organ that has created the regulation at issue is then required to 'study and handle'<sup>71</sup> the suggestion put to it in written form, and to get back to the law Committee. Refusal to comply with the suggestion<sup>72</sup> will trigger a second round of 'review' opened by the same panel that has undertaken the first 'review'.<sup>73</sup> If it is still of opinion that the regulation in question is illegal (unconstitutional), it is called upon to submit the matter to the panel within the Standing Committee, namely its 'Council of Chairmen', which has the power to submit it to the plenum of the Standing Committee for a decision to abolish the regulation, by simple majority vote.<sup>74</sup> So ultimately, after some considerable consultation, the regulation in question may be quashed.

The petitioning mechanism is the first procedure in China allowing ordinary citizens directly to challenge the constitutionality of administrative regulations, local regulations, autonomous regulations or 'separate' regulations. It is a beginning,<sup>75</sup> and it still continues to reflect the contradiction between the two different justificatory ideas of 'supervision' and 'review'. As a supervision mechanism, it rests on the idea that each institution (authority) is in charge of its own rules: therefore the Constitution is watched over by the Standing Committee of the same institution that creates the Constitution (supervision of rule by the

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<sup>71</sup> *Yanchu* (研处).

<sup>72</sup> As for the *Directions on Internment and Deportation*, it is possible that they were scrapped as a consequence of a suggestion from the relevant committee (s) of the NPC Standing Committee.

<sup>73</sup> Wang Zhenmin, *ibid.* calls this a 're-trial' (*zaishen*, 再审).

<sup>74</sup> Wang Zhenmin, *ibid.* calls this a 'last instance trial' (*zhongshen*, 终审).

<sup>75</sup> It does *not* include the option of challenging the constitutionality of 'laws' or indeed of 'local rules' made by local governments, or of 'rules' made by ministries and ministry-level commissions. the so-called Local Rules as well as Administrative Rules are outside the remit of 'review' by the NPC's Standing Committee altogether: for neither have they been produced by the government which the National People's Congress has established, nor have they been produced by a lower ranking People's Congress. Although this procedure has in part already been discussed, it is appropriate in this context again to call to mind the possibility of filing for review (*bei'an*) by central and local governments, in accordance with the Legislation Law and the State Council's *Regulation on Filing Administrative regulations and Rules* and its *Regulation on Filing Autonomous and Separate Regulations*. In the context of that procedure, Local 'Rules' and

ruler), but at the same time an unconstitutional regulation should if possible be withdrawn or altered *in consultation* with the institution (authority) that created the regulation. As a review mechanism, the petitioning mechanism is highly imperfect: I understand that the Legislative Commission receives thousands of ‘suggestions’ each year. Of these thousands of suggestions, not all are ‘handled’, and sometimes the ‘handling’ appears only to consist in making a phone call to the authority (e.g. a ministry) who had made the regulation in question, and suggesting some measure of correcting or abolishing such a regulation, without getting back to the petitioning individual at all. Also, there is no clear procedural connection between court cases and constitutional review at the request of a court. It is easy to think of cases in which a mere revocation, effective as of the date of the revocation or later, might have no effect on the case at hand.<sup>76</sup>

Given that the power to hold judicial review was never thought to be in the hands of the courts, the novelty of the procedure under Article 90 of the *Legislation Law* appears to consist mainly in giving some institutions and the Chinese people the right to ask questions rather than in re-allocating the right to answer such questions. Also, by itself, an institutional disjunction of constitutional review mechanisms from normal court practice can be made compatible with a court practice of respecting and applying the constitution, as various European jurisdictions with well-functioning separate courts or other committees for constitutional review show. It is useful in this context to recall a differentiation made earlier on, between the justiciability of constitutional rights, and the prerogative of constitutional or judicial review of legal norms. The latter

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Administrative Rules respectively can be subjected to a kind of review, and such review can also take place below the central level (be carried out by local governments).

does not on principle affect the power of ordinary courts to adjudicate claims based on constitutional rights infringements.

It is quite possible that the new review mechanism of submitting constitutionality questions to the NPC Standing Committee might evolve into a genuine constitutional review mechanism with the crucial power also to review the constitutionality of other legislation.<sup>77</sup> The problem with the review mechanism introduced by the Legislation Law appears to be much less whether it curtails the power of courts, than whether it can be in itself efficient. In this respect, the confusion about what justifies it – supervision, or review – proves damaging. Article 88 of the *Legislation Law* gives, as we have already seen, the power to alter or annul certain local rules and regulations to lower ranking authorities than the NPC Standing Committee, e.g. local People's Congresses' Standing Committees. The Standing Committee is *not* the body that makes or

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<sup>76</sup> It is not evident, from the provisions of the *Legislation Law*, if any differentiation was intended as to the time from which revocation or declaring invalid of a regulation or rule by the Standing Committee of the People's Congress would be effective.

<sup>77</sup> Michael Dowdle in his 'Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: the Curious Case of China', 35 (2002) *New York University Journal of International Law and Politics* 1, argues that the NPC is easily underestimated in its capacity to promote 'constitutionalism' in an otherwise authoritarian climate, despite its current lack of full democratic legitimisation (as its members are not freely elected). He argues, successfully in my view, that it would be wrong to deny the NPC's potential on the grounds that it lacked legitimacy through elections, or that Chinese people (or the Chinese 'political environment') lacked the right, liberal values. He believes that a 'constitutional evolutionary process' may be successful in China. Yet from the perspective of the present study, it is rather difficult to see how constitutional principles can become meaningful unless they are allowed, in the Chinese phrase, to 'enter the courts.' Perhaps this is because I connect the legitimacy of court adjudication to rights protection, rather than to 'technocratic expertise', as Dowdle does. 'Under the standard constitutional paradigm, administrative and judicial institutions generally found their political authority on claims of special, technocratic expertise, i.e., on their ability effectively to promote particular administrative and regulatory goals.' *Ibid.* p. 190. Dowdle's observation, obviously serving to explain why constitutional legal practice can develop without greater involvement of the courts, that 'nonjusticiability' is 'a commonly found feature of many Western constitutions' (p.103) seems formalistic and is not much to the point of the present discussion, which is normative in character. He uses English law and several Continental jurisdictions as examples; but of course rights designated as fundamental in such documents as the European Convention on Human Rights (ECHR) are protected by English courts; not to mention the new Human Rights Act and the changes it has brought. As for the Dutch constitution, which he also mentions as still 'forbidding judicial review,' fundamental rights protection has effectively been provided for decades through the ECHR mechanism. More important than these historical points is that the Chinese courts, other than European courts, are weakened in their ability to protect rights in ways



alerts or amends the constitution, yet it derives its power from this institution. Is it entitled to 'review' because it is so close to the constitution-maker? Or does its power to review correspond directly to Article 88 of the *Legislation Law*? In that case, does only the NPC Standing Committee have the power to conduct 'constitutional review' of certain regulations, or may local Standing Committees conduct their own constitutional review, and accept and handle submissions for review in the same manner as the NPC's Standing Committee?<sup>78</sup> But then again, how is unity of principle to be ensured?

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described in the main text.

<sup>78</sup> Note that Article 88 refers to the Constitution only in its first sections but not in the later ones, where it details the power of local People's Congresses etc. to review local regulations and rules. In these sections it uses the term 'inappropriate'; but then an unconstitutional regulation could not be 'appropriate'.

## **Chapter Nine Rights advocacy and the changing role of lawyers**

*Voices of dissent.* The preceding chapters juxtaposed traditional with new forms of seeking justice in China, and discussed how traditional attitudes play a role in the protection of legal rights by courts. This discussion resulted in a picture of widely incoherent legal practices, often systematically disregarding legal rights, with only weak efforts to ensure the unity of legal principles. It was argued that it could be acceptable to seek conflict resolution without employing the language and logic of rights. Being silent about one's rights or being unaware of them does not mean one does not have rights or denies that rights are important. While justice can be achieved outside the context of rights protection, where there are courts set up for the protection of legal rights, such rights sometimes ought to be asserted, defended and protected in court. This chapter pursues the question asked at the end of the last chapter, how unity of principle can be promoted in Chinese legal practice. It discusses how Chinese lawyers and other rights advocates can promote rights awareness and rights assertiveness in cases where this is morally important. To be successful, they need to fight for greater social acceptance of public disagreement about what the law requires, as a central element of effective rights protection.

The phrase of it being 'within a person's rights' to do something is characteristic for an understanding of rights, which can encourage both exaggerated hopes and doubts about the moral position of lawyers. The lawyer can be perceived as responsible for defending that realm against outside, whereas what is decided 'within one's rights', is not his but his clients' business. Consequently, one may be disappointed with the seeming ethical indifference of

the lawyer's job, or enthuse about his role as a paragon of rights, understood as good things anyway. *Le juge n'est que la bouche de la loi*:<sup>1</sup> on an analogous understanding one might characterise lawyers as voices vocalising other people's rights and interests. Some of the dignity of the legal profession seems to come from just this ethical independence of the lawyer, who can be seen as upholding the law no matter what the motives and intentions of his client are. But as the practical attention given to legal ethics illustrates, lawyers do have some personal responsibility in influencing their clients' minds as to what they can do and should do. A lawyer's decision to defend someone's rights is as little ethically 'neutral' as a judge's decision to uphold and protect them. As Alford urges us to consider, lawyers may be greedy; they may be oblivious to their moral obligations; they may unduly encourage confrontation. In China especially, they may be induced to strike what he characterises as 'Faustian bargains' with the state and party authorities, and end up stabilising a regime of injustice.<sup>2</sup>

Whether or not background justifications for a particular legal system are available, also matters. Assume that a particular society has no even approximately just distribution of resources, for instance, or suffers from other iniquities – in such a situation, a lawyer faces more moral challenges than in a society with less injustice. Only in those cases where one ought to be rights-assertive, the function of lawyers in litigation assumes particular moral importance: it is not merely justified but required, and sometimes, indeed, it is

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<sup>1</sup> Charles de Secondat Montesquieu, *De l'esprit des lois* (Paris: 1748), translated by P. Nugent (1752) available at <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>.

<sup>2</sup> Alford attacks the romantic idea of the function of lawyers forcefully, in 'Of Lawyers Lost And Found: Searching for legal professionalism in the People's Republic of China', in Rossett, Cheng and Woo (editors), *East Asian Law – Universal Norms and Local Cultures* (London and New York: 2003). Compare the more optimistic view of the legal profession taken by Peerenboom in his report for the Lawyers' Committee for Human Rights, *Lawyers in China: Obstacles to*

urgently required, as a matter of justice. One of the roles in which the lawyer's responsibility for justice comes into focus is criminal defence, and views about criminal defence lawyers are accordingly widely different.

Rights advocates can make people more aware of their rights, and promote confidence that courts will protect them. Lawyers, legal aid clinics, 'barefoot' (untrained) lawyers, academics working together with lawyers, can all be involved in this. In China, there are now also TV programmes,<sup>3</sup> websites, daily newspapers, and extensive legal columns in newspapers, promoting rights awareness and assertiveness.<sup>4</sup>

As a practice of public dissensus about law the practice of lawyers is fairly novel in China. Voicing dissent, presenting a different view of the law and facts, is an indispensable step in the process of protecting rights in court. In a rights-centred system, voicing dissent need not be combined with supplication or even demonstrations of despair or despondency or – as in the case of suicide-remonstration – with what can be interpreted as a gesture both of submission and reproach. When people go to court, especially, there is no indication at all that in daring to dissent they also acknowledged the impossibility or impropriety of challenging the other, an authority. Of course, the mere fact of expressed disagreement does not make the view expressed right. It makes it as little right as a court judgement is right by virtue of being *a court's* judgement.

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*Independence and the Defense of Rights* (New York: 1998), which also deals in great detail with the difficulties in China, some of which are addressed here.

<sup>3</sup> This includes the daily half-hour programme *jinri shuo fa* (今日说法), roughly, 'Today's Conversation about Law', which normally presents one legal case or problem per programme, and is very popular.

<sup>4</sup> As the media are controlled by the government and party, they assume an ambiguous role in this context. To give a sense of the aggressive reporting, note that a Public Security Bureau recently decided to hand out face masks to arrested suspects to protect them. Chen Yu (陈宇), 'Chongqing: arrested suspects will only be taken away into detention after they have been given a head mask (Chongqing: zhuahuo xianfan daizhe touzhao cai yazou, 重庆: 抓获嫌犯戴着头罩才押走), 5 February 2004, available at <http://www.southcn.com/law/fzsytp/200402060091.htm>.

As we saw, many traditional attitudes expressed in such different practices as court-ordered apologies, mediation, and the extortion of confessions from suspects in order to 'solve' criminal cases, assume that no closure is reached, unless there is public recognition of the truth by the principal parties to a case.<sup>5</sup> By contrast, at least in the perception of some members of the public and of government in China at present, legal truth is still not to be disagreed about publicly; instead, such disagreement may appear shameful. Especially in a criminal law context it may even appear like an outrageous attempt at suspension of the law or of reality itself. An angry online commentator on the activity of a legal defence lawyer writes in January 2004:<sup>6</sup>

'Next time Great Lawyer Tian gives an interview to the press he will have something to add to his self-introduction: "[I] once rescued China's biggest mafia boss back from the verge of death, and I have the power, for a time, to change Chinese law; even to change the facts [*shishi*]. The only condition is that you fork out the money!'"<sup>7</sup>

In the case about which the above comment was made, the defence for Chinese mafia boss Liu Yong, apart from arguing against the crime allegations, had also

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<sup>5</sup> Notwithstanding the obvious possibility that the truth has not been found or has been suppressed or distorted. It is important to appreciate that this assumption goes far beyond a mere assumption that there is one right answer to every legal question. Indeed for Western legal philosophers strongly defending *this* view, such as Dworkin, the fact that there is one right answer gives better meaning to disagreement and debate. It may be used in an argument against various forms of pragmatist, postmodernist, and similarly motivated scepticism, because disagreement revolves around what is objectively right, true, the best, and so on: if there were no such central idea, what could argument be about?

<sup>6</sup> Internet use is of course increasingly monitored. See e.g. *Secret China News*, 'Xiao Qiang on the suppression and opposition to suppression of news', *Xiao Qiang: zhongguo xinxi fengsuo he fanfengsuo fenxi*, 萧强: 中国信息封锁和反封锁分析, available at <http://www.secretchina.com/news/Articles/4/4/19/63661.html>.

<sup>7</sup> Yao Gang (姚刚), 'On the four big lawyer accomplices of corruption: from Tian Wenchang to Zhang Jianzhong, Li Kuisheng and Wu Deli (*Guosida "fubai bangxiong" lishi:: cong Tian Wenchang, Zhang Jianzhong, Li Kuisheng dao Wu Deli* 国四大“腐败帮凶”律师: 从田文昌、张建中、李奎生到吴德立)', 26 January 2004, available at <http://www.peacehall.com/news/gb/china/2004/01/200401260718.shtml>. My emphases. Also on the internet, the last character for Tian Wenchang's name, which means 'prosperous, flourishing', was variously misspelt as one that is pronounced the same way but means 'prostitute'. He Weifang, *ibid.* comments on this.

provided convincing evidence that the defendant had been tortured by the police during investigation. This had led the last instance court in his first trial – rather incoherently - to come up with a verdict of *suspended* death sentence.<sup>8</sup> But in Liu Yong's re-trial a few weeks later the Supreme People's Court sentenced him to death without suspension and he was killed within two hours of the verdict. In the eyes of the angry commentator above, arguing in Liu's defence and achieving a suspended death sentence meant *changing the law and the facts*.

While lawyers were almost generally held in low esteem for many centuries,<sup>9</sup> public perception of lawyers is now diversifying in China. This is also due to changes, or at least diversification, in what lawyers do. While there is a growing number of commercial lawyers,<sup>10</sup> lawyers increasingly take on cases involving the protection of rights when citizens are in stark confrontation with state or party power. It is not always different individuals who perform these roles; for instance, commercial lawyers may take on Chinese mafia and corruption cases,<sup>11</sup> or engage in various pro bono activities.<sup>12</sup> In all areas in which they mount direct challenges to government officials or authorities,

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<sup>8</sup> In a public lecture at Beijing University at the end of October 2003, entitled '*falü ren de siwei*' (法律人的思维) and translated as 'Thinking according to a lawyer's mode of thinking', Chen Ruihua (陈瑞华) argued that the court should either have found Liu not guilty, or decided that the evidence of torture was insufficient. – A suspended death sentence, *sihuan* (死缓), means suspension by two years, normally followed by commutation into a life prison sentence.

<sup>9</sup> As is set out in great detail in Macauley's *Social Power and Legal Culture. Litigation Masters in Late Imperial China* (Stanford: 1992).

<sup>10</sup> And therefore frequently exposed to spite and envy, also on the part of police, procurators, and judges. Sun Yaquin comments on this at p. 68, emphasising that especially in the poor provinces there are also many lawyers living in poverty and fearing for their subsistence.

<sup>11</sup> Each lawyer moreover has a legal obligation to handle one legal aid case per year. I understand that commercial lawyers will be reluctant to do so themselves, though, and rather pay for another lawyer to handle any case they may be assigned. The State Council's 2003 *Legal Aid Regulations* (*Guowuyuan ling (di 385 hao) falü yuanzhu tiaoli*, 国务院令 (第 385 号) 法律援助条例) allow for this possibility (in Article 21) and also provide for the possibility of the state setting up its own legal aid centres with legal aid workers.

<sup>12</sup> See, for instance, the report by Zhou Limin (周立民), 'Beijing law firm provides legal aid to Fuyang [milk powder] victims (*Beijing yi lüshishiwusuo wei fuyang shouhaizhe tigong falü yuanzhu*, 北京一律师事务所为阜阳受害者提供义务法律援助)', available at [http://news.xinhuanet.com/newscenter/2004-04/23/content\\_1436680.htm](http://news.xinhuanet.com/newscenter/2004-04/23/content_1436680.htm).

lawyers are at risk of being obstructed or even persecuted, and are subjected to what appear to be increasing efforts at state and party supervision.

*Educating, appointing and controlling lawyers.* Any system needs institutions not only to train and appoint, but also to supervise and discipline and, under certain circumstances, debar or disqualify lawyers. In the area of training and professional qualification of lawyers great progress has been made in recent years in China. In 2002 a national exam was introduced which sets uniform standards for members of *all* legal professions, and is now generally the precondition of obtaining a lawyer's status.<sup>13</sup> According to the *Lawyers' Law*, here is a further requirement of a practical training period – working with other lawyers –, before one can obtain a licence to practice as a lawyer. After a phasing-out period, the precondition for taking the National Legal Exam is moreover to have studied for a law degree at university. Compared to before, this means a considerable improvement in ensuring a sufficient fund of legal knowledge on the part of anyone who wants to practice as a lawyer.<sup>14</sup>

For a discussion of how far Chinese lawyers can work to protect rights, the rules setting out the requirements for lawyers' professional ethics and discipline are of particular interest. The 2001 *Lawyers' Law*, for instance in its Article 36, contains a group of provisions addressing and seeking to prevent conflicts of interest, for instance by ruling out working for both parties in the same dispute, ruling out unfair competition, and illicit contacts with judges, procurators or

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<sup>13</sup> It is called *guojia sifa kaoshi* (国家司法考试) and conducted (supervised) by a special office of the Ministry of Justice. The Supreme People's Court, Supreme People's Procuracy and Ministry of Justice jointly issued *Provisional Measures on the State Law Exam* (国家司法考试实施办法 (试行)) on 31 October 2001.

other 'concerned officials' outside one's work context.<sup>15</sup> The law, moreover, states what the lawyer's task is, as 'protecting the legal rights and interests of the client within the limits of his mandate in civil law, and as 'providing material and views which demonstrate [are evidence of] the suspect's or defendant's innocence or the lightness of his crime or his [deserving] mitigation of punishment, and protecting the legal rights and interests of the suspect or defendant', in criminal matters (Articles 27, 28). Of course, it is the point of litigation to determine these lawful rights and interests. Forceful argument on all sides of a dispute will help this process, and in this context the development of civil, especially commercial law, has played a great role in strengthening the adversarial style of conflict resolution in China. By participating in the litigation process, lawyers also effectively help the task of deciding what the law is on a certain case.<sup>16</sup> In that sense they have a duty towards the court and the public, but this is a secondary obligation. Some provisions of the *Lawyers' Law* seem likely to hamper the lawyer's main responsibility for their client. For instance, Article 35 subsection five prohibits the provision of false evidence or inciting the parties to provide false evidence, without qualifying this as to intention or negligence. Article 33 requires that lawyers keep 'state secrets', without further indicating what state secrets are, or who decides on what counts as such.

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<sup>14</sup> To prevent clashes of interest and duties, there are also provisions stipulating that no one may work as a lawyer for two years after leaving the judicial or procuratorial profession. Such career changes happen rather frequently, due in part to the difficulties faced by judges and procurators.

<sup>15</sup> It has for many years been a great problem with judges that they allowed themselves to be bribed for instance by accepting dinner invitations, presents, etc. To give an impression, a recent report mentions the striking-off of a lawyer who openly sent out letters to judges offering commission payments for the introduction of clients by the judge: Niu Xiaobo (牛晓波, pen name?), 'The intricate entanglement of judges and lawyers (*Faguan yu lüshi de weimiao jiuchan*, 法官与律师的微妙纠缠)', 30 June 2004 in 21<sup>st</sup> Century Herald (21 世纪经济报道) available at <http://www.nanfangdaily.com.cn/jj/20040701/zj/200406300017.asp>.

<sup>16</sup> In different jurisdictions, doctrinal approaches to a lawyer's (barrister's) position and status in the judicial process vary.



At least as important as the substance of the rules setting out lawyers' ethical obligations, are the arrangements made for their teaching and enforcement. In China there is firstly the All China Lawyers' Association heading more local lawyers' associations, set up in accordance with Articles 37 ff. of the 2001 *Lawyers' Law* as 'self-regulating organisation' (Article 37), The ACLA is responsible, according to Article 40 subsection four of the *Lawyers' Law*, for teaching, investigating and supervising the professional ethics and (self-) discipline of lawyers. It is also required to distribute praise and incentives or impose measures on its members. Membership is compulsory (Article 39).<sup>17</sup>

The most severe disciplinary measures are taken directly by the local Bureau of Justice, which is a branch of the Ministry of Justice (an institution separate from the People's Courts and People's Procuracies).<sup>18</sup> This Bureau can issue warnings or suspend the licence to practice law for up to three years, as well as confiscate illegal gains of lawyers and in serious cases withdraw the licence to practice (Article 47). The grounds on which it can do so include those already stated above, but also 'other forms of conduct which ought to be disciplined,' according to Article 44 subsection eleven of the *Lawyers' Law*. An important 'supervisory' function is also performed by a third institution, namely the People's Procuracies, as they are generally responsible for the prosecution of

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<sup>17</sup> The Ministry of Justice, in its *Measures for the disciplining and punishment of illegal conduct on the part of lawyers and law firms* come into force on 1 May 2004, specifies in its Article eight further cases in which disciplining measures can be taken according to Article 44 of the *Lawyers' Law*. Among these are 'to use the media or (commercial) advertisements for the purpose of untruthful or inappropriate publicising or dissemination,' a provision that leaves somewhat unclear *what* must not be disseminated. It could be read to refer only to commercial self-advertisement – or it might be read to refer even to the general dissemination of legal views. Subsection 21 of the same provision specifies 'other illegal conduct or conduct contravening the professional ethics of lawyers or public [civil] morality, and seriously harming the image of the lawyer's profession.' See *Lüshi he lüshishiwusuo weifa xingwei chufa banfa*, (律师和律师事务所违法行为处罚办法) 'decree' (ling, 令) no. 86 issued by the Ministry of Justice on 19 March 2004, available at <http://www.southcn.com/law/lfdt/200403240458.htm>.

criminal offences by lawyers in a professional context. This is a particular problem with criminal defence lawyers, where the Procuracy and the lawyers are already opponents.

The new 2004 *Measures for the disciplining and punishment of illegal conduct on the part of lawyers and law firms* say that the Bureaus 'may' refer matters to the ACLA for investigation, in which cases the association is required to investigate fully and fairly and to submit suggestions for the handling of the case to the Bureau. This reaffirms the Bureaus' right and ultimate responsibility to supervise (Article 12). Lawyers or law firms are given the right to administrative litigation against a decision. (Article 13). The right to interpret the *Measures*, however, is claimed to lie with the Ministry itself, by Article 16.

Trying to predict how the practice is going to develop would be difficult. But the clearly evident trend towards greater supervision of lawyers<sup>19</sup> could counteract the dynamic inherent to the role of lawyers in the litigation process, in suppressing lawyers' ability to help voice that kind of dissent, which is important, because it helps rights protection where it is urgently required. It could obstruct them from challenging authorities infringing important rights of citizens. In a way not dissimilar to the treatment of judges, perceived malpractice and corruption among lawyers, too, is answered by more supervision, stricter

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<sup>18</sup> Alford says, moreover, that the Ministry of Justice has 'filled the ranks of the All China Lawyers' Association with its own personnel,' *Ibid.* p. 187.

<sup>19</sup> Besides the Measures mentioned just above, in March 2004, the Ministry of Justice and the Supreme People's Court issued a joint notice (*tongzhi*) *On the relevant rules on the regulation of the relationship between judges and lawyers to ensure just adjudication. Guanyu guifan faguan he lüshi xianghu guanxi weihu sifa gongzheng de ruogan guiding de tongzhi*, notice no. 9 in 2004. 关于规范法官和律师相互关系维护司法公正的若干规定》的通知。法发（2004）9号。 This declaration is mainly concerned with describing kinds of interaction between lawyers and judges that were forbidden; for instance, giving presents to the judge, telling one's (prospective) client that one knows the judge, or seeking to meet with the judge in a private setting. It also puts obligations on the judge to 'ask for the lawyers' views' in litigation (Article 10) and to hold public hearings and to inform the parties and lawyers about the progress of the case, but 'the

government control, and by criminal prosecution, rather than by strengthening the independence and potential for self-regulation of the profession, or by putting trust in a judicial mechanism outside the context of criminal law and disciplinary procedures.<sup>20</sup>

To give an example of increased supervision, the Shanghai City Bureau of Justice announced in April 2004 that it was going to publicise 'integrity' or 'credibility records' for each of the 570 law firms in Shanghai City, online in co-operation with an online service website for lawyers.

'In the future, it will only need a lawyer or a law firm to lose credibility, to be subjected to an [administrative, Bureau of Justice] punishment measure or to engage in other not pretty professional conduct [*bu liang zhiye xingwei*], for such conduct to be entered in the file [to be set up for this purpose], to be entered into the *dang'an* file,<sup>21</sup> and to be disclosed [online] in a timely manner. The department under the Ministry of Justice will publish within a set time the results of investigation into lawyers' violations of law or discipline and of the measures taken, and thus create standards for [*guifan*] and restrain [*zhiyue*] the lawyers' professional conduct.'<sup>22</sup>

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judge must not disclose secrets of adjudication,' and the lawyer 'must not use illegal methods to find out about the state of the case' (Article 5).

<sup>20</sup> There appear to be elements of self regulation, as well as a connection with the authority issuing the licence to practice in most systems. In the U.S., for instance, there are disciplinary committees set up as sub-structures under the court, which may be composed of judges or lawyers and include laypeople, depending partly on the nature of the offence in question. In the German system, the lawyers' associations set up courts consisting exclusively of practicing lawyers but appointed by the justice administration at the suggestion of the associations. The decisions of these courts are subjected to judicial review in administrative courts, according to the German *Rechtsanwaltsordnung*.

The above-mentioned Congressional Executive Commission Report recommends at its end that disciplinary committees be set up the ACLA under oversight of either the Ministry of Justice or the People's Procuracy.

<sup>21</sup> *Dang'an* files are to be kept of every individual or organisation according to the law on this (*dang'an fa*, 档案法).

<sup>22</sup> Yang Jinshi (杨金志), 'Shanghai sets up a credibility record for lawyers to publish results of investigation and measures imposed within set time (*Shanghai wei lushi jian "chengxin jilu" dingqi gongbu chachu jieguo*, 上海为律师建“诚信记录” 定期公布查处结果), available at [http://news.xinhuanet.com/legal/2004-04/19/content\\_1427496.htm](http://news.xinhuanet.com/legal/2004-04/19/content_1427496.htm).

Note the habit, too, of party-related or state-related media as well as other organisations to elect 'ten great legal personalities of the year' and similar model legal professionals.

An ultimate supervising function is exercised by the Communist Party, not only through the fact that the Ministry of Justice and the All China Lawyers Association is heavily influenced by it, but also because each law firm<sup>23</sup> is under obligation to set up a Communist Party branch either by itself or together with other law firms, which must have at least three members.<sup>24</sup> Communist Party membership appears highly desirable to many ambitious young people in China today.<sup>25</sup> It means joining an elite.<sup>26</sup> The most recent important doctrine or slogan given out by Jiang Zemin in 2000 is the 'Three Represents', the formula that opened the Communist Party up toward the new middle classes and elites. It says that the Communist Party now represents three groups or values in society:

'It represents the development trends of advanced productive forces.  
It represents the orientations of an advanced culture.  
It represents the fundamental interests of the overwhelming majority of  
the people of China.'<sup>27</sup>

A report of the party branch association of Junhe law firm (Beijing), which is one of the two or three biggest Chinese law firms at present,<sup>28</sup> for instance, considers the role the Party can and should play toward lawyers and law firms in the following manner.

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<sup>23</sup> There are now three forms of organisation of law firms in China. There are the law firms that emerged from the old state-owned law firms, namely firms 'with capital invested by the state', whose liability is limited to this capital. Then there is a mixed form of law firms whose liability is limited by the contributions to the capital made by the lawyers. Finally, there are partnerships, with joint and several liability of the partners. So far, lawyers are not allowed to practice on their own. See *Lawyers' Law*, Articles 36-38.

<sup>24</sup> Alford mentions this, for instance, *ibid.* at p. 188.

<sup>25</sup> It is also attractive to join any of the other 'Democratic Parties', which are allowed to participate in consultations and legislative drafting processes..

<sup>26</sup> There were about 66 million Communist Party members in 2002, in a population of about 1.3 billion, which amounts to around five percent. See *China Today* on the Communist Party of China, information available at <http://www.chinatoday.com/org/cpc/>.

<sup>27</sup> See the introduction to the 'Three Represents' available at the China Internet Information Center at <http://www.china.org.cn/english/zhuanti/3represents/68735.htm>.

<sup>28</sup> The report is written in or after 2002.

‘We believe that, considering the most fundamental factors determining the national condition [*genben guoqing*], namely the status of the Party and the nature of the state, it is not possible to determine the status of the Party entirely as that of a centre of leadership, but it should have, it should develop its function of ensuring and supervising. What we mean by ‘ensuring’, is ensuring that the work of the entire law firm can develop in a healthy and orderly manner, and what we mean by ‘supervising’, is to supervise the operation of the law firm in accordance with the Party’s broader policies [*dazheng fangzhen*] and the legal regulations of the state.’<sup>29</sup>

*The task of criminal defence lawyers.* A certain view of criminal justice which we may term the conservative view in China, and which has imperial as well as Maoist origins, makes it easy to regard suspects as criminals not deserving the protection of the law. This attitude, again, is reminiscent of the Maoist distinction between ‘contradictions between the people and enemies of the people’ and ‘contradictions among the people’. Only internal contradictions are matters of right and wrong, Mao said. If criminals or a certain type of criminals are regarded as enemies of the people rather than as elements in ‘internal contradictions’, then they place themselves, in a certain way, outside the law: although types of crime perceived to harm the public in a particular way, such as corruption, are wrong and unlawful conduct by definition, the way society responds to such conduct is not determined by the categories of right and wrong, but by those of friend and foe.<sup>30</sup>

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<sup>29</sup> The report is entitled ‘Actively promoting the party branch’s work by exploring the spirit of reform (*Yi tansuo gaige de jingshen jiji tuijin dangzhibu gongzuo* – *Beijing shi Junhe lüshishiwusuo dangzhibu*, 以探索改革的精神积极推进党支部工作——北京市君合律师事务所党支部)’, available at <http://www.bjsf.gov.cn/Article/detail.asp?UNID=6954>.

<sup>30</sup> For the distinction between two kinds of contradiction, see Mao Zedong, 1957, ‘On the Correct Handling of Contradictions Among the People’, (translation) in Selden, Mark, *The People’s Republic of China: A Documentary History of Revolutionary Change*, New York Monthly Review Press, 1979, pp. 324 ff. For the application of this distinction in criminal procedure see also Clarke and Feinerman, ‘Antagonistic Contradictions - Criminal Law and Human Rights in China’, (1995) 141 *The China Quarterly* 135-154.

Only when a liberal and rights-conscious view of criminal responsibility is adopted, does the criminal trial clearly assume the function of determining the facts on the basis of which the defendant will be judged and treated, and do evidentiary rules take the function of protecting defendants. This understanding leaves no room for the possibility that a defendant should be punished according to ‘substantive’ justice, but will walk free according to ‘procedural justice’ in some cases, though the distinction is sometimes used in this way to express the supposed ‘Chinese’ emphasis on ‘substantive’ criminal justice.<sup>31</sup>

Because, it seems, of the continued strength of the conservative view of criminal justice in China, criminal defence lawyers’ work continues to be greatly obstructed, resulting in a decline of the percentage of criminal defendants represented by lawyers, as well as in a general weakening of defence lawyers’ morale.<sup>32</sup> In ‘How difficult is it really to be a criminal defence lawyer?’, a legal researcher with the Judicial Research Institute of the Chinese Ministry of Justice characterises the principal difficulty as one of mindset:<sup>33</sup>

‘Once a suspect has been locked up and is detained [*guanya*] some of the people handling the case will be convinced in their minds that he is a bad person, and make a ‘presumption of guilt.’ They will also think that the lawyer stores [away] the person’s money and destroys [evidence], and helps the suspect to speak [in his defence]; so from their perspective they will rather be set against the defence lawyer (...) In their hearts, they find it very difficult to recognise that the lawyer’s participation in the criminal

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<sup>31</sup> For instance, Peerenboom remarks *ibid.* at p. 376 that ‘As has been true for the last two thousand years, the Chinese criminal system favours substantive over procedural justice.’ The problem with this attribution of a belief is that it presupposed acceptance of the importance of the distinction. It could well be argued, however, that in a system truly concerned with rights of the defendant, it was part of substantive justice to acquit people guilty of a crime, under certain circumstances.

<sup>32</sup> This is the assessment provided in ‘Congressional Executive Commission on China, ‘Defense Lawyers Turned defendants: Zhang Jianzhong and the Criminal Prosecution of defense lawyers in China’’, available at [http://www.cecc.gov/pages/news/zhang\\_052703.php](http://www.cecc.gov/pages/news/zhang_052703.php) and <http://www.cecc.gov/pages/news/zhangupdate.php>.

<sup>33</sup> One of his suggestions is to strengthen the role of the Ministry of Justice and the Bureaus beneath it in supervising lawyers.

procedure process promotes just adjudication, that he protects the legal rights and interests of the suspect and defendant, and that he helps to prevent miscarriages of justice.’<sup>34</sup>

These attitudes have found further expression in numerous regulations and practices. So for instance defence lawyers will find it difficult to see their client in police detention. They also have problems with viewing the files of the case, and with the gathering evidence. According to Article 95 of the *Criminal Procedure Law* the first interview between the lawyer and his client ‘should’ happen after ‘the first interrogation,’ but it is the police which determines when the first ‘interrogation’ has taken place. Excessive detention is a problem already discussed in the previous chapter. There are also no rules for enforcement of the right to see their client for lawyers.<sup>35</sup> When torture has been used, then the police are unwilling to admit lawyers as long as the wounds resulting from it have not yet healed;<sup>36</sup> on the other hand, so far as there are no traces of torture left, lawyers cannot usually prove that it happened in court. Anecdotal evidence suggests that lawyers are not allowed to take cameras into the detention stations, and that often the police or the procuracy are present during interviews of detained suspects or defendants with their lawyers.

Despite a concerted effort, beginning in 2003, to improve working conditions of defence lawyers, much remains to be done. Eight days after Liu Yong’s execution, for instance, the Supreme People’s Procuracy issued a

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<sup>34</sup> Or more literally, individually unjust, fabricated or mistaken judgements (*yuan, jia, cuo'an*, 冤假错案). Sun Yequn (孙业群), ‘How difficult is it really to be a criminal defence lawyer – thoughts about the problems faced by lawyers participating in the criminal litigation process (*Zuo yige xingbian lüshi jiu jing you duo nan – lüshi canyu xingshi susong huodong youguan wenti de sikao* 做一个刑辩律师究竟有多难 ——律师参与刑事诉讼活动有关问题的思考)’, (2003) *Chinese Lawyer* (*Zhongguo Lüshi*, 中国律师) April issue, p. 67; available at <http://www.hanjilawyer.com.cn/juanji/juang3-76.htm>.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

*Regulation on Protecting the right of defence lawyers legally to perform their duties in criminal procedure*,<sup>37</sup> which provides, among other things, that the procuracy should arrange for an interview within 48 hours of a request on the part of the defence lawyer to see his client, except in 'important' (!) cases of corruption involving several suspects. It says that the defence lawyer has the right to ask the suspect not only about the case but also whether his right to physical integrity and his right to defend himself have been infringed while in detention, during the interview. It also says, however, that a procurator may attend interviews between the lawyer and the suspect during the 'investigation' period, although it rules such attendance out after conclusion of this period, that is, once a suggestion to prosecute has been made.<sup>38</sup> It is important to appreciate that these regulations were issued by the Supreme People's Procuracy and do not, therefore, apply to people in police detention and under police investigation, that is, to the majority of people detained as suspects.<sup>39</sup>

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<sup>37</sup> *Guanyu renminjianchayuan baozhang lüshi zai xingshi susong zhong yifa zhiye de guiding*, passed on 30 December 2003 (关于人民检察院保障律师在刑事诉讼中依法执业的规定, 2003年12月30日最高人民检察院第十届检察委员会第16次会议通过). On 11 March 2004 a meeting on the enforcement of this regulation convened members of the Supreme People's Procuracy and the Ministry of Justice who, several weeks after the second trial of Liu Yong, emphasised the need to protect criminal defence lawyers' right to perform their task in the criminal process. Se Gu Ruizhen (顾瑞珍), 'The Supreme People's Procuracy reiterates its guarantee of protection for the rights of the criminal defence lawyers (*Gaojian sifabu chongshen quebao xingshi bianhu lüshi yifa zhiye de quanli* (高检司法部重申确保刑事辩护律师依法执业的权利)', available at [http://news.xinhuanet.com/legal/2004-03/11/content\\_1360818.htm](http://news.xinhuanet.com/legal/2004-03/11/content_1360818.htm).

<sup>38</sup> The *Regulations* also address the defence lawyer's right to make suggestions toward the procuracy, especially regarding excessive detention, which, as has been mentioned, was a problem specially tackled in 2003. Finally, the *regulations* address the lawyers' rights to inspect the files of the case, and to gather evidence. The right to gather evidence is arguably restricted rather than extended by the *Regulations*, which merely allow lawyers to apply to the procuracy so that it gather evidence, rather than directly to gather it themselves.

<sup>39</sup> There are some apparent attempts at 'co-operation' between criminal defence lawyers and the procuracies. According to a report in April 2004, an agreement was reached between the Beijing procuracy and the 'Beijing lawyers' – perhaps the Beijing Lawyers' Association – to co-operate in the battle against corruption. Worryingly, the Xinhua news report details the obligations of the procuracy (to guarantee access to clients within a set time), but not those of the lawyers. On the latter, it only says: '...The signing of the agreement benefits the procuracy's and lawyers working hand in hand, and their jointly protecting the legal rights and interest of the parties to a procedure, and their reaching a mutual understanding [of the case at hand?] through the principles of co-operation and mutual forgiveness and understanding.' See Li Jia and Yu Gao (记者李佳 通讯员



There are not only procedural rules hampering the work of criminal defence lawyers. It is not just that they should not get on the wrong side of the police for their client's sake. Lawyers must also be cautious not themselves to offend against substantive criminal law rules, or find themselves locked up for no proper reason.<sup>40</sup> Criminal offences which lawyers, especially defence lawyers, are likely to be accused of include the fabrication of evidence, fraud (possibly at the allegation of dissatisfied clients of the lawyer), the disclosure of state secrets which may consist in 'disclosing' the facts of the case or of documents belonging to case files, obstruction of the administration of justice, and collusion with criminals.<sup>41</sup> It appears that only in few cases, lawyers detained by the police are then really prosecuted for a crime they have committed.<sup>42</sup>

Most importantly, there is a special criminal statute to punish lawyers who falsify evidence, as opposed to anybody else committing this crime. Article 306 sets a lower threshold for criminal liability than Article 307, in several ways. It punishes a certain criminal conduct, rather than the result of an action.<sup>43</sup> It also punishes merely 'helping' to destroy or forge evidence, whereas for any other person only using 'violence, threat, bribery or any other means' to get someone

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郁高), 'Anti-corruption office of Beijing City People's Procuracy reaches agreement with lawyers and will join forces with lawyers to fight corruption (*Beijing shi jian fantanju yu lüshi da xieyi, jiang yu lüshi xieshou fanfu*, 北京市检反贪局与律师订协议 将与律师携手反腐)', available at [http://news.xinhuanet.com/legal/2004-04/22/content\\_1433668.htm](http://news.xinhuanet.com/legal/2004-04/22/content_1433668.htm).

<sup>40</sup> Sun Yaquin, *ibid.*, reports that of 200 lawyers detained altogether only in 'special' cases prosecution followed detention. He provides further statistics. This fact suggest that detention often occurs without any real basis for prosecution, as an intimidating measure.

<sup>41</sup> Sun Yaquin, *ibid.*, mentions these offences in the statistics he provides for Henan province. According to him, between 1995 and 1999 there were six cases of falsifications of evidence, two of fraud, one of disclosure of state secrets, one of obstruction of (perverting) the course of justice, and one of sheltering criminals. During this time, there must have been on average about 4250 lawyers in the province, and in 1999, for instance, each lawyer handled 4.8 criminal cases, statistically. The Article provides statistics for Zhejiang and Hangzhou provinces, too, which show that the ratio of criminal cases handled by lawyers has fallen.

<sup>42</sup> Sun Yaquin, *ibid.*

<sup>43</sup> Sun, *ibid.*, argues that this applies only to Article 306 but not to Article 307.

to destroy or forge will constitute criminal liability.<sup>44</sup> It is the police and procuracy – their natural opponents – who are in charge of investigation and prosecution in the case of Article 306 offences.<sup>45</sup> Article 306 has recently come under so much attack, that there are signs that it might be repealed,<sup>46</sup> but it is unclear how much this would help, as long as it is possible to ‘apply’ Article 307 to intimidate defence lawyers.<sup>47</sup>

While on the one hand we find evidence of great resentment against criminal defence lawyers, there are also interesting suggestions in legal practice to encourage the mediation of criminal matters that can be privately litigated, even when they are being prosecuted publicly in a concrete instance.<sup>48</sup> This

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<sup>44</sup> Incidentally, too, merely to ‘obstruct’ the gathering or providing of evidence (*weihai zhengju*), moreover, will trigger criminal liability for the lawyer, but the same conduct will only trigger a disciplinary measure for judges. Sun, *ibid.* p. 68 provides this argument, drawing attention to the Supreme People’s Court’s *Measures for the Disciplining of Judges* Article 34.

<sup>45</sup> Sun, *ibid.* says that ‘in the [criminal] litigation process, the prosecution is both a player and a referee, and thus hardly on a par with the defence.’

<sup>46</sup> XiaoYang in the English language edition of *China Daily* on 12 April 2004, ‘Scrapping Article 306 would make law fairer’, reports that ‘[a] National People’s Congress representative confirmed last week that a special perjury charge for lawyers in the Criminal Law will likely be removed. Although the legislature member did not reveal a specific timetable for the law revision, the news is enough to cheer up the nation’s more than 130,000 licensed lawyers, as well as everyone who believes in the rule of law.’

<sup>47</sup> In a prominent recent case generating a lot of fear among Chinese defence lawyers, criminal defence lawyer Zhang Jianzhong was eventually convicted of a crime according to Article 307, not Article 306, in a manner presumably pre-empting criticism of Article 306. For a detailed account see ‘Congressional Executive Commission on China, ‘Defense Lawyers Turned defendants: Zhang Jianzhong and the Criminal Prosecution of defense lawyers in China’, available at [http://www.cecc.gov/pages/news/zhang\\_052703.php](http://www.cecc.gov/pages/news/zhang_052703.php) and at <http://www.cecc.gov/pages/news/zhangupdate.php>. Many claimed that Zhang was locked up simply because he had caused anger among police and other officials, who may have wanted to see him ‘disciplined’, and got rid of as a criminal defence lawyer. By defending his client; by opposing the view of the prosecution, the lawyer had apparently turned himself into an enemy of society. Again to quote Yao Gang: ‘That the so-called ‘great lawyers’ of China have set up together with corruption for [personal] gain can be called a tragedy for Chinese society! However, just like others who choose to become “gangsters” [here the author uses a transliteration of the English word], these lawyer accomplices of corruption are putting themselves at risk with every step they make. They may at any time cut off their own future, and land themselves in prison.’ Yao Gang (姚刚), ‘On the four big lawyer accomplices of corruption: from Tian Wenchang to Zhang Jianzhong, Li Kuisheng and Wu Deli (*Guosida “fubai bangxiong” lüshi:: cong Tian Wenchang, Zhang Jianzhong, Li Kuisheng dao Wu Deli* 国四大“腐败帮凶” 律师: 从田文昌、张建中、李奎生到吴德立 )’, 26 January 2004, available at <http://www.peacehall.com/news/gb/china/2004/01/200401260718.shtml>

<sup>48</sup> Mao Guofang (毛国芳), ‘Ideas on establishing pre-trial mediation for all criminal cases that can be litigated privately (*Xingshi zisu anjian shezhi qianzhi tiaojie chengxu de gouxiang*, (刑事

confirms the tendency in Chinese legal practice to consider matters of right and wrong as matters of exact and sensitive consideration of relationships and positions. This attitude appears to change suddenly and radically at some point, when people become suspects and defendants. But such a swift change of attitude, which detracts from the attractiveness and justifiability of criminal legal practice, is not necessary. A sensible appreciation of the function of the rights of the defendant may be able to help change it. Only advocates of rights within the Chinese legal system, people with an impact on Chinese society, can bring about such a change. But because in the context of criminal law, lawyers are exposed to a high degree of public distrust, and due to remaining inadequacies of Chinese criminal procedure, including the widespread use of torture, lawyers are often too intimidated or powerless to defend their clients effectively.

‘Our courts - I myself don’t often go to court to listen to the pleas and arguments delivered by our friends, the lawyers, but in a case like that of Chen Xitong<sup>49</sup> there was some television footage where we could see the lawyers up there in court [on the raised platform where the benches of the defence lawyers and procuracy are]. In that trial, the judge would speak and then ask, did the lawyer have anything he’d like to say? No he didn’t, the lawyer would reply. After a while the judge would ask again, did the lawyer have anything he’d like to say? No, he didn’t. I only listened up to the third “no”. - And *this* is the role our lawyers play in court.’<sup>50</sup>

*Protecting the rights of the weak in a weak legal system: legal aid.* Criminal legal cases are given much attention by the Communist Party, the government, and the people, and this is sometimes seen as evidence of an increase in ‘legal

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自诉案件设置前置调解程序的构想), posted on 6 September 2002 at <http://www.shefy.com/Discuss/detail.asp?id=134>.

<sup>49</sup> This was a mayor of Beijing who was convicted of corruption 1998. See, for instance, the BBC report ‘The corrupt comrade’ at <http://news.bbc.co.uk/1/hi/world/asia-pacific/143163.stm>.

<sup>50</sup> Transcript of He Weifang’s speech by the lawyer Chen Yuan Zheng (臣远征), ‘Transcript of Professor He Weifang’s speech - the epochal task of the Chinese lawyer (*He Weifang jiaoshou yanjiang shilu - zhongguo lüshi de shidai shiming* 贺卫方教授演讲实录——中国律师的时代使命)’, available at <http://forum.acla.org.cn/showflat.php?Board=22&Number=450759..>

awareness' (*falü yishi*) among the people. But as discussed before, an emphasis on criminal law may also serve to divert from certain primary rights issues. Whereas criminal cases require the services of lawyers to a relatively few in society, in areas such as property and labour law, lawyers and courts are required to help protect many. When we think of the protection of the rights of 'the many', what may come to mind first are the rights to life and liberty, and rights to property and other material goods. But just as in a criminal law (right to life and liberty) context, effective protection will crucially depend on the right to voice public dissent with important authorities. Because the protection lawyers give in these contexts is approved of by a much wider public than in the case of criminal defence, their work can be even more irritating to the government authorities which, besides private individuals, come under attack.

Land distribution and labour law are particularly important and sensitive rights issues in China at present. There is an increasingly unequal distribution of resources, and a large number of people are subjected to deprivation of the basis of their livelihood at the cost of others, who are getting rich fast.<sup>51</sup> Woodiwiss points out that the restructuring of the Chinese economy towards a market economy model has led to a situation where employment is very largely based on contractual relationships,<sup>52</sup> while at the same time the property regime remains heavily impacted by the doctrine of state administration of national or public ownership. The protection of private property is now guaranteed in the Chinese constitution, but of course a guarantee like this does not mean that everyone is guaranteed to have any given amount or kind of property. It does not guarantee

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<sup>51</sup> Deng Xiaoping's famous slogan of 1992 was 'let a few people become rich first.'

<sup>52</sup> See, for instance, A. Woodiwiss, *Making Human Rights Work Globally* (London, Sydney: 2003), at pp. 83 ff.

social justice; it may only guarantee some important preconditions of social justice.

Ordinary workers in China today face many problems, whether they work for the often unviable (formerly) state owned companies or for private companies. For instance, if they are affected by the transformation of state-owned enterprises converted into companies limited by shares and largely owned by the state,<sup>53</sup> there are great problems with workers being insufficiently compensated for the loss of welfare benefits from their former 'work unit' or being laid off altogether.<sup>54</sup> At the same time, there is a rising number of employment disputes.<sup>55</sup> Especially in the context of construction work, it is a common phenomenon for employers to keep workers, often migrant workers, on for weeks and months without paying them (full) wages, and without paying any insurance for them.

In this area, the state is encouraging ordinary workers to seek rights protection, be it through labour tribunals arbitrating disputes,<sup>56</sup> or through the courts.<sup>57</sup> Rights protection is seen as an important tool to prevent social unrest. As ordinary workers, especially those being owed their wages or social security

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<sup>53</sup> They usually still have a large proportion of shares that can be transferred but cannot be publicly traded: here, the state asserts its ownership.

<sup>54</sup> In some cases, the way used to satisfy the workers' demands for some security and some compensation for losing all the benefits they used to have when the business 'changes its system' (*gaizhi*) is to give them some of the shares; sometimes there are mechanisms whereby the shares may exclusively be bought by and sold to employees. Often, the schemes thus developed leave employees much worse off than before.

<sup>55</sup> See for instance the report on the 2004 *White book on Employment*, 'Chinese White Book on Situation and Policies regarding Employment published (*zhongguo de jiuye zhuangkuang he zhengce baipishu fabiao*, 《中国的就业状况和政策》白皮书发表), 26 April 2004 on Xinhuaawang, available at <http://www.jcrb.com/zyw/n222/ca236650.htm>. For a discussion of problems in the (large) public sector, see Li Jinghua (李京华), *Renshi jiu fen zhe cheng redian* (人事纠纷渐成热点), [http://news.xinhuanet.com/legal/2004-02/01/content\\_1293587.htm](http://news.xinhuanet.com/legal/2004-02/01/content_1293587.htm).

<sup>56</sup> Which are apparently very much prepared to mediate.

<sup>57</sup> A report at Xinhuaawang informs us that in 85% of employment disputes in Shanghai, the workers win. See the report *Shanghai: 85% de laodong zhengyi anjian laodongzhe shengsu* (上海: 85% 的劳动争议案件劳动者胜诉), available at [http://news.xinhuanet.com/legal/2004-05/01/content\\_1450486.htm](http://news.xinhuanet.com/legal/2004-05/01/content_1450486.htm).

payments, tend not to be well paying clients, they make for a large part of the clientele of legal aid centres and university legal aid clinics that have been set up over the past few years. The *Legal Aid Regulations* require each lawyer to handle one legal aid case per year, but as has already been mentioned, these obligations are often disregarded and legal aid has to be provided in another way. In Beijing, for instance, the City's Legal Aid department cooperates with universities to provide legal aid. There are also various educational activities by a number of different organisations and institutions, whose aim it is to educate workers about their rights.<sup>58</sup> These activities are important to the development of rights assertiveness, because they encourage people to ask what they are owed, by reference to their contractual rights.

Protecting the socially weak in the context of employment disputes, may lead one naturally on to try and protect them in politically more sensitive contexts. Many of the major universities have set up legal aid clinics, and in some, their work is combined with scholarly and publications activities directed at improving rights protection in sensitive areas, and at improving judicial and constitutional review mechanisms.<sup>59</sup> Among the rights they protect are tenants' rights in urban and rural redevelopment areas. The market in housing developments and industrial developments is producing much iniquity for

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<sup>58</sup> See, for instance, 'Over 1500 workers in Beijing seek advice on protecting their rights – delayed wages become the hottest topic (*Beijing 1500 duo ming zhigong zixun falü weiquan – tuoqian gongzi cheng redian*, 北京 1500 多名职工咨询法律维权 拖欠工资成热点), Xinhuaawang on 27 October 2003, available at [http://news.xinhuanet.com/legal/2003-10/27/content\\_1143630.htm](http://news.xinhuanet.com/legal/2003-10/27/content_1143630.htm). These activities are generally called *pufa* (普法, disseminating [knowledge of] the law) activities. Compare the website *Zhongguo pufawang* (中国普法网), [www.legalinfo.gov.cn](http://www.legalinfo.gov.cn).

<sup>59</sup> For instance, Tsinghua University's Constitutional Law and Civil Rights Center, whose web address is <http://www.legalaid.org.cn/>. It was set up in co-operation with the Beijing Lawyers' Association. While its legal aid activities concentrate on employment conflicts and 'the weak in society', its academic activities included seminars on Sun Zhigang's case (see chapter seven) and other representative fundamental rights cases (See the reports on these seminars at the website just mentioned.)

families who have the use of certain plots of land but - generally - no clear and specific legal claims to it, both in the case of state-owned land occupied by city residents and of collectively owned farmland.<sup>60</sup> People in effective control over land – village heads, for instance – make use of this fact by contracting rights of use away to property developers, with no or inadequate monetary compensation to those who used to live on this land.<sup>61</sup> In the case of land in the cities, frequently the city government administers the ‘publicly owned’ real property, and sells rights to use limited to a maximum 70 years to land developers. This sale is usually preceded by a department of the city government making an *abstract* administrative planning decision (that cannot be challenged in court) for the area effectively sold off, and then evicting residents on the basis of this decision. Citizens affected in this way are increasingly unwilling to submit to the idea that they may only challenge or ask for redress for some aspects of eviction,<sup>62</sup> but not the eviction itself in court. Perhaps a poignant image for this is a Beijing resident trying to resist eviction from his home – unsuccessfully – with a copy of the Chinese constitution in his hand.<sup>63</sup> Often, the only step forward

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<sup>60</sup> See He Weifang’s comments, *ibid.* on the question of sensibly distributing, or ‘returning to the peasants’, land owned collectively by villagers. He refers to the distribution in place under ‘landlords’, that is, apparently to the time before or at the very beginning of the Communist regime, and states that the records then existent are now largely destroyed.

<sup>61</sup> Compare e.g. the renowned economist’s He Qinglian’s ‘Where is the Boom of the Chinese Real Estate Industry Coming From?’, published in *Epoch Times* of 8 May 2004, available at <http://feeds.bignetwork.com/redirect.php?id=8659d99a489c5d92>.

<sup>62</sup> The amount of compensation residents are given, and violence used during eviction.

<sup>63</sup> See Bao Limin (包丽敏), ‘An old resident of Chongwen district in Beijing resists the coerced eviction and demolition of his home with a copy of the constitution in his hand (*Beijing Chongwen qu yi ming lao ren shouchi xianfa dizhi qiangzhi banqian*, 北京崇文区一名老人手持《宪法》抵制强制搬迁)’, 5 April 2004, available at [http://news.xinhuanet.com/legal/2004-04/05/content\\_1400429.htm](http://news.xinhuanet.com/legal/2004-04/05/content_1400429.htm). To some, this gesture may evoke the image of president Liu Shaoqi with the constitution in his hands in 1968, telling the Red Guards who came to arrest him at the order of Mao Zedong, that they had no right to do so. Liu Shaoqi died in detention.

may appear to be a petition to a governmental authority, using the 'letters and complaints' mechanism introduced in chapter four.<sup>64</sup>

It is only when lawyers and academics intent on promoting rights protection in those areas where such protection is unwelcome to government also make use of the public media, that they can have any real impact on people's general rights assertiveness.<sup>65</sup> But just as criminal defence, these activities put lawyers and other rights advocates at risk. A Shanghai 'tenant rights lawyer' who passed on information about cases to the organisation 'Human Rights in China', was convicted in December 2003 for passing on 'state secrets' abroad.<sup>66</sup> In the following spring, two editors/managers of the newspaper group Southern Metropolitan Daily, Southern Weekend (*Nanfang Zhoumo*), which had been reporting on the case of Sun Zhigang (see chapter seven) as well as on 'sensitive' areas of rights protection such as urban evictions,<sup>67</sup> were convicted of

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<sup>64</sup> As for instance the petition submitted to the letters and complaints offices of Wen Jiabao and Hu Jintao in November 2003 by Liu Zhengyou from Zigong City, Da'An District, Hongqi village in Sichuan Province, 'I am telling the truth to the General Secretary and to the Premier (*Wo xiang zongshuji, zongli jiang shihua*, 我向总书记, 总理讲实话)', dated 2 November 2003. He distributed copies of the petition to the general public by hand.

<sup>65</sup> The most dramatic example both of the effectiveness of reporting and of the risks incurred thereby so far has been the case of Sun Zhigang, the man detained as 'vagrant' and killed in detention for deportation (see chapter seven). It was not least the fact that many academics rallied to support the reporting of this case by the media, which allowed it to become an issue discussed nationwide by lawyers, academics, and the general public. Influential academics wrote about it. The Guangdong based newspaper group Southern Metropolitan Daily, Southern Weekend (*Nanfang Zhoumo*) and, later, other newspapers suddenly reported on a number of similar cases. Then, the law was changed. This was the first event of this kind in post-socialist China.

<sup>66</sup> Human Rights Watch, 'China: Tenant Rights Advocate Arbitrarily Jailed. Lawyer Accused of circulating Secrets to Rights Group', 19 December 2003, available at <http://hrw.org/english/docs/2003/12/18/china6762.htm>. The report also says that 'Official statistics show that 850,000 households and 2,500,000 residents were relocated in Shanghai during the past decade. Since 2000, at least 80,000 Shanghai households have been relocated every year for renovations to the old city district.'

<sup>67</sup> For instance, the report by Zhao Ling (赵凌), 'Ten years of eviction tragicomedy (*chaiqian shinian beixiju*, 拆迁十年悲喜剧南方周末)' in *Southern Weekend* (南方周末) of 4 September 2003, at <http://news.sina.com.cn/c/2003-09-04/1131691557s.shtml>. A surge of reporting about eviction just around this time (see further links at the website just mentioned), was followed by nearly complete silence about it.



'corruption' and sentenced to years of imprisonment, and the persecution of editors of this newspaper continues.<sup>68</sup>

Just as there is an increasing rights awareness and assertiveness in those areas where the rights of many are violated – property, as discussed here, and the right to life and liberty, as discussed earlier on the context of unlawful detention, for instance – and in criminal law, so, too, increasing attention is given by Chinese intellectuals to the importance of the freedom of mind. Jiao Guobiao, for instance, a Beijing professor for communications and media, placed an Article 'Against the Department for Communications' on the internet in April 2004, in which he gave 'fourteen reasons for challenging the Department.'<sup>69</sup> There is also an online petition for a change in the law on instigating the subversion of state power, and for releasing Du Daobin,<sup>70</sup> who had published an essay online, entitled (in translation) 'Subversion of State Power is Legal'.<sup>71</sup> Of course, for reasons discussed in chapter seven, advocacy for the right to free speech has no forum in the Chinese courts yet.

From the few public discussions of this matter available in mainland China, one can sense a growing recognition of the fact that observation is frequently made, that freedom of speech not only requires appropriate legal mechanisms to

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<sup>68</sup> *The Guardian* of 19 March 2004, 'China Sentences Former Paper Managers'. The arrests and convictions were widely characterised as arbitrary. The sentences were reduced (to seven and eight years) in second instance, see Wu Jun (吴俊), 'Second instance judgement for former manager of Southern Metropolitan Daily changes sentence to eight years, *Nanfang dushibao an ershen xuanpan, yuan zongjingli Yu Huafeng gaipan 8 nian*, 南方都市报案二审宣判 原总经理喻华峰改判 8 年', 15 June 2004, at [http://news.xinhuanet.com/legal/2004-06/15/content\\_1526906.htm](http://news.xinhuanet.com/legal/2004-06/15/content_1526906.htm).

<sup>69</sup> Jiao Guobiao (焦国标), 'Fourteen reasons to attack the Department for Communications (*Taofa zhongxuanbu de shisige liyou*, 讨伐中宣部的十四个理由), available at <http://beijing.spring.com/c7/xw/wlwz/20040329191737.htm>.

<sup>70</sup> The petition is available at <http://sky.prohosting.com/liudiorg/DuDaobin01e.htm>.

<sup>71</sup> The Article says, for instance, 'People's disdain for our current government is twice or more than twice than it was for the Nationalist Party, since the Communist Party is not beholden to democratic principles and clearly does not benefit the people. People appealing to the government,

protect it, but also a change of attitude about public disagreement. An interesting and subtle Article by He Sanwei, for instance, discusses ‘the meaning of “allowing [government] to say wrong things”’.<sup>72</sup> The Article can be read as a suggestion that one change one’s attitude, from looking for responsible official scapegoats whenever government has made a mistake – has said something wrong -, to reasonable and open discussion of mistaken judgements by government officials. But if government should be allowed to say ‘wrong things’, this further suggests that anyone should be allowed to say wrong things. This certainly contravenes the attitude taken by the Department for Communications.

The central importance of freedom of speech as a precondition of a legal practice aimed at rights protection, and of creating conditions in which the mode of adversarial ‘dissenting’ legal argument is possible, are also emphasised by He Weifang.

‘...[The historian] Han Degang has studied Chinese history, including its ancient but most prominently its modern history, in great depth. He considers that China has undergone two major transformations in its history. The first occurred from the time of the Early Qin through to the Qin and Han dynasties, when they changed from a well-field system to a system of landlords and counties.<sup>73</sup> This was a major transformation and it took about two hundred years. He thinks that the second transformation began in 1840 when the Chinese people were confronted with the challenge of Western culture. This time our aim is to allow this great country, with a history of five thousand years of civilisation, to complete another transformation: a transformation towards democracy, a legal system, and mechanisms of constitutional government. Given the size of our country and our long history, this transformation cannot be effected all in one go. We are still at the Three Gorges of history, and we have to get through the rapids and dangerous currents of the river down to a stretch of water that has the smooth surface of around Wuhan. As to when we get there, according to Han Degang it took two hundred years last

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such as unemployed workers, become the Communist Party’s opposition...’It is available at <http://english.epochtimes.com/news/3-12-18/17308.html>.

<sup>72</sup> He Sanwei (何三畏), ‘The meaning of “allowing people to say wrong things” (“Yunxu shuocuo hua” de yiyi, “允许说错话”的意义’), 3 March 2004 in *Nanfang Zhoumo*, available at <http://www.nanfangdaily.com.cn/zm/20040226/xw/tb/200402260001.asp>.

<sup>73</sup> (*Cong jingtianzhi dao junxianzhi* 从井田制到郡县制.)

time and so it may take something upward of two hundred years again this time. It's a hundred from 1840 to 1940 and then another hundred from 1940 to 2040. In 2040 I'll be only just ninety; if I keep well I may live to see that day. I am rather optimistic.'<sup>74</sup>

This discussion by He Weifang, as well as the preceding discussion of the situation of lawyers and other advocates in rights-sensitive issues, warrants an important conclusion. Unity of principle in China's current, increasingly rights-centred legal practice can only be achieved through a more liberal practice (or culture) of public disagreement and greater freedom of speech, which is not a mere 'luxury right' for intellectuals. Without such liberalisation no rights issue, including the seemingly very different disputes about employment, land, and housing for China's poor majority, can be resolved.

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<sup>74</sup> Transcript of He Weifang's speech by the lawyer Chen Yuan Zheng (臣远征), 'Transcript of Professor He Weifang's speech - the epochal task of the Chinese lawyer (*He Weifang jiaoshou yanjiang shilu - zhongguo lüshi de shidai shiming* 贺卫方教授演讲实录——中国律师的时代使命)', available at <http://forum.acla.org.cn/showflat.php?Board=22&Number=450759>.

## Chapter Ten      Conclusion

The present study of the changing nature of dispute resolution in China, and of responses to injustice through various social and legal institutions, has two main conclusions. One concerns the question how China can address injustices in its society through rights protection, and one concerns the relation between dispute resolution and justice.

*Strengthening the Chinese legal system to provide better rights protection.* What characterises Chinese legal practice best at the moment is a weakening opposition of trends and practices: there is a practice of paternalistic direction and control set against the practice of rights protection; a practice of judicial supervision set against judicial independence. This could perhaps be expected from a society so full of tensions as the Chinese one in its present, post-socialist, but also – still – post-imperialist stage.

One important part of this study has been to look at the ways ordinary people usually seek redress for wrongs they have suffered (especially at the hands of government officials), without exclusively paying attention to mechanisms which ‘we’ as Western observers expect to see.<sup>1</sup> It is important to understand the intricacy of *shangfang*, for instance, not just to focus on the development of mechanisms more clearly directed at rights protection than *shangfang*, such as administrative reconsideration and litigation. It takes no particular evidence-gathering effort to see that many people in China now want to choose, for instance, to express their political views, or to form free religious

associations, or to move freely within their own country. The disadvantaged want equal education benefits for their children, and they want to be protected against corruption, against being arbitrarily locked up and held for ransom by government officials, and against being thrown out of their houses or deprived of the land they work without adequate reasons, fair warning, and appropriate compensation. The more basic the things wanted, the less protest against having them taken away is a matter of real choice.

In an article about a series of lectures given by Professor Dworkin in a number of elite Chinese universities in 2002, Fang Liufang complains about criticism of the Chinese legal system ‘from outside’.

‘Regardless of people’s differences in culture, profession and education they all live in a particular society and exercise limited choices determined by the respective system, and the majority of people will usually choose to conform to the system. To initiate reforms by oneself or in a group of people means paying a high price with no guarantee of success (...) It is a personal decision how much one wants to pay for freedom, and when and how one wants to pay that price. No one could make such a decision for another. Political theorists living in an open society cannot have any real experience of what it means to live under a different kind of system, yet they always think they have sufficient moral superiority to tell others what to do.’<sup>2</sup>

The point that asserting freedoms, especially in conditions of oppression, is a personal decision, is well taken. But then we must acknowledge ‘choices’ to take risks can be forced on those who suffer the *worst* oppression, and the fact that the initiation of reform by even just publicising one’s views does come at a price is not indifferent to our evaluation of the respective legal and political system.

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<sup>1</sup> This is a problem noted by many Western observers; Lubman uses the phrase of ‘seeing oneself in the mirror’, in his introduction to *Bird in a Cage* (Stanford: 1999).

<sup>2</sup> Fang Liufang (方流芳) ‘Taking the rules of the academic game seriously - some sentiments upon reading the reports of Dworkin’s visit to China (*Ruhe renzhen de kandai xueshu youxi* 如何认真地看待学术游戏 ——读德沃金访华报告有感 )’, available at [http://www.oycf.org/Perspectives/Chinese/Chinese\\_9\\_01312003/FangLiuFang.htm](http://www.oycf.org/Perspectives/Chinese/Chinese_9_01312003/FangLiuFang.htm).

Criticising the Chinese legal system, as this thesis does in several respects, does not necessarily imply reproach of anyone since no person *is* the system. At the level of individual people in a repressive system it would indeed seem as wrong to reproach anyone for not taking risks, as it is impossible not to admire those who do take them.<sup>3</sup>

While some entrenched dispute resolution mechanisms not directed at rights protection, such as mediation (*tiaojie*),<sup>4</sup> remain useful and appropriate within certain limits, others, such as petitioning and remonstrance, can no longer provide adequate ways of bridging the distance between ordinary people and governments when they have come in conflict. The phenomenon of ‘mass petitioning’ (*jitifang*),<sup>5</sup> the inability of many of the petitioned institutions to respond adequately to petitions, and the uncompromising urgency with which people increasingly demand redress for wrongs, all demonstrate this. Government and party authorities’ and the privileged new middle classes’ frequent disregard for ordinary people’s legitimate wishes and complaints, on the other hand, is triggering conflict on a scale that cannot be resolved by merely punishing officials who acted wrongly. While these conflicts are not resolved adequately by mechanisms essentially for government self-control. It is also clear from the preceding discussion that a choice has to be made on how the Chinese judiciary should develop. It cannot become *both* more supervisionist and more rights-centred. If judges are to be strong, they must not continue being directed in an authoritarian way as to how they should judge individual cases. This is more easily understood if we consider that court adjudication derives its moral appeal

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<sup>3</sup> To tell from Dworkin’s written account, he was not making such a mistake. See Dworkin’s ‘Taking Rights Seriously in Beijing’, (2002) *New York Review of Books* (September issue) 46.

<sup>4</sup> 调解.

<sup>5</sup> 集体访.

not from some version of state-conferred authority to judges, nor from an authority implicit in the concept of law, but from its task of protecting people's legal rights.<sup>6</sup>

From within a system of governance characterised by extended rather than distributed power, positivistic accounts of law strongly relying on the idea of law's authority seem to be attractive, because they offer a conception of strong and clearly limited legal rules to be followed by the officials of the system.<sup>7</sup> Superficially, the problem with much of Chinese law to date is that it does not have or even consistently claim authority to guide people, because of the related phenomena of inconsistent legal rules at different levels, and officials with an attitude of 'I am the law' - assuming the role of a Hartian ruler ('Rex I'), rather than of a Hartian official of the modern legal system.<sup>8</sup> So naturally, people are much concerned with strengthening the law's authority. An important element of Hart's positivistic account of law, and one that pervades many of the debates about law and justice in China to date, is the idea that legal rules have a certain area of application even though occasionally the law 'runs out', leaving certain cases to be decided by judges exercising discretion without applying legal rules.

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<sup>6</sup> At the same time, it is important to understand the present weaknesses of judicial rights protection in its wider context of incoherent 'legislation' and of the emergence of an unjust two-class society in China, and to acknowledge that even at its best, judicial practice will only be able to correct some of the injustices occurring in China to date.

<sup>7</sup> Contemporary legal positivists tend to explain this authority or claim to authority by some notion of public or social recognition, societal self-understanding and the nature of the concept of law (Raz), or recognition implicit in the practice of state officials (Hart). See Raz, Joseph, 'Notes on Value and Objectivity', chapter 6 of *Engaging Reason* (Oxford, 1999), p. 118, and Raz, Joseph, 'Two Views of the Nature of the Theory of Law: A Partial Comparison, 1998 *Legal Theory* 249, and Raz Joseph, 'Authority, Law, and Morality', chapter 9 of *Ethics in the Public Domain* (Oxford: 1996). For Hart, see *The Concept of Law* (2<sup>nd</sup> edition, Oxford: 1994).

<sup>8</sup> Famously, Hart's account of a legal system proceeds from a simplistic version in which the sovereign, 'Rex', rules through 'the acceptance of a rule conferring authority to legislate.' The assumption of this authority-conferring rule, Hart argues, is also needed to explain why laws Rex made continue valid beyond the time of his actually exercised power; for instance, into the time of his successor's reign. Sovereignty here is constituted by legislation, which according to Hart consists in issuing rules. Hart, *The Concept of Law*, p. 60. But the rule from which authority derives, and the rules which it authorises one to issue, are not the same.

The situation of Chinese legislation as discussed in Chapter Five, on this understanding, exposed the lack of any core set of distinct legal rules in the first place, because there is incoherent 'legislation' ranging across different levels of administration (or government) and the rules applied are often quite different from those provided by national or even provincial legislation. It was concluded, sceptically, that only some fundamental legal principles seemed to remain untainted by the problems with incoherence and inconsistency identified in Chapter Five; but then later it became clear that there were explicit instructions to Chinese judges *not* to apply the Constitution 'directly'. A positivistic authority-centred understanding of law therefore serves well to expose one of the weaknesses of the Chinese legal system at present. But it gives us no direction for how to strengthen it.<sup>9</sup> If we try to determine the significance of these courts by reference only to social fact, political power and success,<sup>10</sup> then they will simply seem insignificant:

'The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have been given. Here all that succeeds is success.'

The idea of authority implicit in this understanding of success is corroded in a situation where repressive rulers do not allow judges ever to assume the function of filling legal 'gaps'.

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<sup>9</sup> In Hart's account of a legal system in *The Concept of Law*, courts and judges are already in place and they are strong institutions in the sense that they can perform their tasks of identifying valid and applicable law and applying it well. More widely in Western legal systems courts and judges represent powers which other political powers have to accommodate themselves to. But in China, of course, courts lack power, and judges are exposed to unique schemes of discipline and supervision.

<sup>10</sup> Hart, *The Concept of Law*, p. 152. This also relates to the 'creative' aspect of judges' powers on Hart's account.



It seems easy to conclude from the lack of authority Chinese law appears to have that it should be more strictly enforced and that its supervision should be more strictly supervised. The idea of law as chiefly a form of conveying and exercising authority is apparently guiding the aspirations of China's present rulers for the future. In an often-used Chinese phrase, the important standards set by the project of 'ruling the country in accordance with' or 'by law'<sup>11</sup> are 'to have a law that can be applied; having to apply the law one has; to apply the law with strictness; and to correct cases of violation of the law.'<sup>12</sup> The programme resulting from this understanding is to provide more detailed and disciplined law by ensuring consistency among legal rules, to restrict - as has been attempted by the *Legislation Law* - the number of authorities entitled to make law, and to minimise cases in which judges have discretion because the law 'has run out.'

The image of the judge complementing such legislative activism has been clearly passive. Rather than at least sometimes characterising 'judicial activism'<sup>13</sup> as a 'noble dream', in Hart's phrase, many in China roundly reject it as a 'nightmare', as we saw in Chapter Seven.<sup>14</sup> The phenomenon of controversial rights discourse in courts would only seem to disturb the project of 'ruling the country by law' as envisaged by China's rulers.<sup>15</sup> But a study of

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<sup>1111</sup> *Yi fa zhi guo* (依法治国).

<sup>12</sup> *You fa ke yi, you fa bi yi, zhi fa bi yan, wei fa bi jiu* (有法可依, 有法必依, 执法必严, 违法必究).

<sup>13</sup> The often-used Chinese phrase for this is *sifa jiji zhuyi* (司法积极主义).

<sup>14</sup> This account requires a distinction between two entirely different kinds of reasoning: one, to determine what the law is, the other, to determine what it should be. Adjudication, as Hart understands it, is primarily concerned with the first kind of activity, and the fact that it cannot entirely refrain from the second was characterised by him in one of his essays on American jurisprudence as a potential 'nightmare'. Hart, Herbert, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream', *Essays in Jurisprudence and Philosophy* (Oxford: 1983), essay 4, p. 121.

<sup>15</sup> Perhaps, indeed, the image of the insufficiently controlled imperial magistrate is in the background of such fears: but then the culturally well-entrenched requirements of 'according with feeling' and 'according with reason' and the Confucian emphasis on 'propriety' may have provided an important complement to orders imposed on the magistrate-judge 'from above'.

individual cases and an interpretive account of the system in which they occurred (both of which this thesis has attempted to provide) show that if the project of ‘ruling the country in accordance with law’ is understood and carried out in this way in China, then legal processes will not be able to provide correction of the most urgent injustices in Chinese society, which they might otherwise provide. It will not be able to provide a good replacement for the overstretched petitioning and remonstrance mechanisms, and it will not allow for a good understanding of law, because constitutional rights and principles shape the law and so must be applied in courts, and elsewhere.

In a case discussed in Chapter Seven, the *Case of Li Caokang*,<sup>16</sup> the court combined ‘strict application of the law’ with a ‘statement’ to the effect that the severity of the law actually applied had been *tempered* by a voluntary payment. This payment, it stated, was made by the successful defendant, a government authority. The plaintiff was a citizen who had lost his son in the process of the independently flawed application<sup>17</sup> of an unconstitutional legal regulation.<sup>18</sup> This ‘decision’ and the court’s ‘statement’ were praised, we saw, as ‘according with law, reason and feeling:’ only we could not help concluding that the ‘reason and feeling’ part of this process was dissociated from the legal part in this case. A decision ten years later in the *Case of Yuan Wen* (Chapters Six and Seven) required directly that the government authority in an in some respects similar case pay some compensation to the citizen whose rights had been violated.

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<sup>16</sup> At p. 179.

<sup>17</sup> Li did have a work permit although he was stated to have said he was out of work upon his detention; the records used in the court judgement unconvincingly stated he had been taken to hospital twice in four days while interned and that ‘nothing the matter’ had been discovered with him, but then that he had died ‘of a slow consumption’ at the end of these four days.

<sup>18</sup> In the absence of the *Legislation Law*, then not yet in place, it would have needed a different kind of argument to come to this conclusion. But Article 37 of both the 1982 and 1993 Constitutions (the 1993 Constitution amendment law had just been passed when the case happened) already stated only the police could carry out detention, for instance.

Without dwelling on the problem of constitutionality of the legislation involved, the court at least managed to conclude, correctly, that government authorities had misapplied law in this particular instance. But the injunction on courts to keep away from constitutionality review<sup>19</sup> remains strong, as the widely commented case of the two judges in Luoyang in 2003 (mentioned in Chapter Eight) showed. These two examples seem to illustrate that an explanation of adjudicative authority by reference to consensus or to command and obedience among officials is inferior to a rights-centred account, *especially* in a weak legal system like the Chinese one. In a Chinese context, the first kind of account has the particular disadvantage of closing the practice of law to those elements of feeling (*qing*) and reason (*li*), and to the idea of ‘alterity’, reciprocity and direct equality (*shu*) which can improve our understanding of rights in any cultural or political context, as it was argued at the beginning of this thesis.

If we take a rights-centred perspective, we will see the real difference between the new developments in Chinese legal practice, and some of its important legal traditions. We should not be unwilling to see such differences, because of some confused assumption that rights can only succeed in China, if we find out, happily, that they have been part of Chinese culture all along, or that the Chinese have been talking about rights for a sufficiently long time to possess ‘the concept’ of rights now, or indeed because of the even more confused notion, now sometimes proffered as unargued wisdom, that ‘we shouldn’t judge’ others. Actually, as has been argued in Chapter Two, at their most abstract rights introduce a mode of argument that centres on the individual, and insists that justice be done to him or her: this principle we recognise to be respected in the

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<sup>19</sup> Some prefer to speak of *unconstitutionality* review in Chinese (*weixian shencha*, 违宪审查),

practice of Chinese mediation, which seeks voluntary consensus between the disputing parties as equals. But to become part of Chinese court practice, rights require the strengthening of some relatively novel modes of judging (dispute resolution), and this is what makes them attractive to some in China (not to others). As was recorded in Chapter Three, the very attraction of 'rights talk' in China came initially from its being a new kind of talk, according to recent research; a new instrument for some of the new problems Chinese society was - and is now - facing. But despite this, and although we can usefully characterise the Chinese legal system as a system in transition, we should not be led too easily to assume that the transition in fact will be one toward a more rights-centred system.

*The status of disagreement about justice in dispute resolution.* I think that my discussion of contemporary legal practices in China has brought out how important a set of particular attitudes toward errors, mistakes and wrongs is to rights-centred legal systems, by showing how this attitude contrasts with attitudes implicit in some Chinese legal practices (including that of courts). To reach this conclusion I have looked at a foreign legal system to see what was different and remarkable about our own practices; but then also to look back at the foreign practices in an effort to understand both sides better.

The situations aptly and comprehensively characterised in Chinese as *min gao guan*,<sup>20</sup> - 'an ordinary person accusing an official' - call for some toleration of dissensus in society.<sup>21</sup> The right to complain, generally, towards state

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stressing the way unconstitutionality leaves judges no choice.

<sup>20</sup> 民告官.

<sup>21</sup> As not only the lengthy quotation from He Weifang's article in the last chapter, but also the characterisation of forms of public protest show, such accusations quickly lead to some kind of

authorities, has been acknowledged in the ideal if not wholly in the practice for a long time in China; but such a 'right' was widely not understood to support sustained and principled dissensus in society. In most instances it just expresses the possibility of submitting petitions. Due also to the precarious 'cleavage'<sup>22</sup> currently opening up in Chinese society between rich and poor, and between rural and urban population, petitioning mechanisms are now no longer enough. Dissent with government is taking dramatically new forms in Chinese public life, especially in urban and semi-urban areas.<sup>23</sup> Gradually, too, Chinese courts are becoming places in which dissensus can be made public. Chinese intellectuals are calling for more tolerance and relating these calls to the idea of 'limited government', thereby expressing opposition to the idea of an all-powerful, comprehensively responsible government.<sup>24</sup>

A discussion of the Chinese system shows how important it is that in rights-centred systems, judges are singled out for making right decisions which we should follow, *even though* we may think them wrong, and criticise them. At a certain level, therefore, rights-centred adjudication practice could be described as a way of imposing systematic discipline upon sustained disagreement. Public

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ritualisation of public disagreement (about justice), and the spectacle of court procedures achieves something similar.

<sup>22</sup> *Duanlie*/[Social]Cleavage (断裂) is the Chinese/English title of a sociological book by Sun Liping (孙立平), *Cleavage: Chinese society since the nineteen- nineties* (*Duanlie: Ershi shiji jiushiniandai yilai de Zhongguo shehui* 断裂: 20 世纪 90 年代以来的中国社会, Beijing: 2003). He argues persuasively that the gap between rich and poor is widening also in urban society, where the lower middle classes stopped benefiting proportionately (or even significantly) from economic growth in the nineties, while a few rich people have become richer than ever.

<sup>23</sup> As we saw in the last chapter, for instance because of technical changes in the public media. An interesting manifestation of changes in attitude was the plea for tolerance for government officials occasionally 'getting it wrong' or 'saying wrong things.'

<sup>24</sup> I quote Wang Zhenmin and Lü Xiaobo as contributors to the discussion of 'limited government', connecting this idea to limited liability-based corporate governance in chapter five. Another writer, Cheng Jie, argues that the idea of a written or posited constitution is connected to the concept of *shu* (恕), alterity, and the idea of tolerance, but also to the idea of limited government, and of a social contract. See Cheng Jie (程洁), 'Three philosophical sources of

disagreement about central questions occurs in any community of people, but many communities treat disagreement with much greater wariness than rights-centred ones. A particular value attributed to disagreement is particularly evident from the practice of courts of law. The moral appeal of adjudicating rights in courts comes from courts' and judges' ability to stand apart from other branches of government, and judge in a manner reaffirming people's rights. These include an abstract right to make wrong judgements, as well as a limited right to do the wrong thing.<sup>25</sup> These attitudes could be described as attitudes of tolerance and discipline: it is accepted that we differ about the fundamental principles of our political community, but discipline is imposed on the way disagreement may influence decisions; hence the importance of finality of court decisions.

But the conclusion we should draw from this is not, in my view, that adjudication about rights has a different purpose from Chinese mechanisms we have looked at. It is not that the purpose of different forms of dispute resolution is reaching either a decision in the face of sustained disagreement (the normal situation in court adjudication), or reaching consensus.<sup>26</sup> 'Different procedures' do not 'have different moralities,' as Fuller claimed. The point of dispute resolution is rightness and truth, not alternatively consensus or some disciplined form of disagreement. Even though better rights protection is necessary in China, then, it would be wrong to think that the practice of rights protection was

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constitutionalism (*Lixian zhuyi de san zhong sixiang yuanliu*, 立宪主义的三种思想源流), at <http://www.gongfa.com/chengjielixianzhuyisanchaoliu.htm>.

<sup>25</sup> There is, too, the humane idea that we must not become obsessed with correcting wrong actions or decisions just for the sake of correction. The point of our efforts may get lost in the process of correction, when we discover that we cannot retrieve lost time, as Chinese courts sometimes do. This is why in some places a description of Chinese practices came to resemble the situations and mechanisms envisaged by what is called moral 'perfectionism'.

<sup>26</sup> This is what is misleading in characterisations of adjudication as 'adversarial'. They are adversarial in many ways, but that is not their moral point.

opposed to reaching consensual and just solutions to disputes. It is after all not shameful or wrong to be persuaded, or to apologise genuinely, or to forgive.

Single-minded concentration on one's rights may sometimes blind one to what justice, understood as a personal virtue, demands of an individual person locked in conflict. Chinese mediation is an interesting and instructive practice, in which the undoubted authority of the mediator is put under a constant check: for it is strongly appreciated and emphasised that while deference to the mediator is good, the mediator must be both persuasive and just; and no mediation will work unless it is genuinely accepted by the parties – the implicit and often explicit presupposition being that a solution is acceptable, if and when it is right. Despite the long Chinese tradition of paternalistic supervision, direction and education of officials, the indigenous practice of Chinese mediation appears to work best with strong mediators, who have the same power as judges and whose strength significantly resembles that of judges. They understand not only the importance of letting people have their say,<sup>27</sup> and of getting it right, but also of being persuasive. Yet worthwhile consensus still is consensus on what is right (*shifei*). In these aspects, Chinese mediation culture represents a strain of resistance to being ruled by mere coercion, which is also (as we have seen) present in some of China's Confucian political philosophy: no ruler rules entirely free from the requirement to justify himself.

In some situations it may even be that justice is done fully only when reconciliation is achieved: but nothing hinges on the fulfilment of a requirement of 'justice' as a distinct virtue, in my view; what is important is that the right

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<sup>27</sup> Fuller's well-known characterisation of the essence of adjudication (see discussion in Chapters Three and Four). Fuller, 'Mediation – its Forms and Functions', (1971) 44 *Southern California Law Review* 305, and 'The Forms and Limits of Adjudication' (1978), Chapter One in Freeman, Michael (ed.), *Alternative Dispute Resolution* (New York University Press: New York, 1995).

thing is done. A practice of rights protection does not preclude a practice of conciliation and mediation. If it did, it would not only be Chinese legal practice that would be facing problems, but any rights-centred legal practice, as the contemporary discussion about 'alternative' dispute resolution mechanisms illustrates.



## Appendix I

### Table of Cases of mediation, remonstrance, reconsideration, litigation, and disciplinary measures discussed or mentioned<sup>1</sup>

*The case of the demonstrators in front of a Beijing hotel* (ch. 2, p. 33; no written reference available)

*The case of Ye Guoqiang's suicide attempt on Tian'anmen Square* (ch. 2, p. 43)

*The case of Zhu Zhengliang from Anhui, who set fire to himself in front of the portrait of Mao Zedong on Tiananmen Square, on 15 September 2003, in protest against eviction and demolition* (ch. 2, p. 43 note 35)

*The mediation case of Mr Ah and his wife, who could not have children* (ch. 4, p. 91)

*The mediation case between the Gong and Liu families, regarding a footpath* (ch. 4, p. 92)

*The mediation case of Mr Wu and his stepdaughter, involving mediator 'Porridge' Su* (ch. 4, p. 96)

*The mediation case about Yu Xiaosan, who refused to marry his neighbour's daughter after he slept with her* (ch. 4, p. 101)

*The court mediation case 'settling' the dispute between a blackmailing husband and the man with whom his wife betrayed him* (ch. 4, p. 107 note 74)

*The case of Wang Xingmao, whose son was held for ransom in an internment station* (ch. 5, p. 110; at p. 107 note 8 there are further references to other internment case reports)

*The Case of Ye Zhiqiu, a journalist's, internment in a police station overnight* (ch. 6, p. 137, note 2)

*The case of the official Wang Huaizhan, first expelled from the CPC, then from his government post* (mentioned in ch. 6, p. 143 note 22)

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<sup>1</sup> Due to the nature of this study, a limitation only to court decisions would be inappropriate. References given here direct to where in the main text the cases are discussed or mentioned and further referenced, in the order in which they appear in the dissertation; *mostly* these are references to news reports rather than official law reports or files (see Introduction).

I have chosen the common way of referring to the cases in China, so that e.g. *the case of Sun Zhigang* refers to Sun's murder, which triggered an (aborted) administrative litigation procedure, and a criminal trial. The cases discussed at some length are put in **bold**.

*The case of a number of officials in Xiangfan (Hubei) suffering the Party's 'two prescribed' treatment (mentioned in ch. 6, p. 144 note 24)*

***The 'shangfang' (complaints visits) case of Ma Jiyun who tried to get a court judgement enforced, and was interned for making unreasonable complaints (ch. 6, p. 150)***

*The case of seven Shanghai citizens arrested for coming to Beijing to make complaints visits (demonstrate), thereby 'causing a public disturbance' (a report mentioned in ch. 6, p. 155 note 59)*

*The case of peasants who signed the 'Ten Thousand People's Memorandum' detained to prevent them from demonstrating (a report mentioned at p. 155 no. 60)*

***The administrative reconsideration and litigation case of eighty-year-old Mr Yuan Wen, who was interned wrongfully as a vagrant in Shenzhen (ch. 6, p. 156, and ch. 7, p. 176)***

***The criminal litigation case of Sun Zhigang's internment (as vagrant) and murder in a Guangdong internment station (ch. 7, p. 168)***

***The criminal litigation case of Liu Yong, a Chinese mafia (heidang) boss who was re-tried and sentenced to death, after getting a milder initial final sentence because 'it could not be excluded that he had been tortured' by the police (ch. 7, p. 171 and note 22, also ch. 9, p. 226)***

***The administrative litigation case of Li Caokang's internment (for vagrancy) and death in a Shanghai internment station (ch. 7 p. 179)***

***The disciplinary case of the Luoyang judges facing dismissal for declaring that a lower-ranking legal regulation violated a higher-ranking one (ch. 7, p. 184, and ch. 8, p. 203)***

*The (civil litigation) case of Zhou Jianjun v Beijing City branch traffic police squad of Chaoyang District traffic police, in which the judge chose 'not to apply' a lower-ranking legal regulation that violated a higher-ranking one (ch. 7, p. 184 note 35)*

***The 'constitutional' litigation Case of Qi Yuling, whose fellow student 'stole' her identity to go to College and get a job in her name (ch. 7, p. 189)***

***The 'constitutional' case of the petitioners to the NPC's Standing Committee to get the Internment and Deportation Directives abolished (ch. 8, p. 216)***

*The criminal case of criminal defence lawyer Zhang Jianzhong (referred to in ch. 9, p. 239 note 47)*

*The case of a Beijing resident trying to resist eviction with a copy of the Constitution in his hands (mentioned in ch. 9, p. 244 note 63)*

*The criminal case of two editors of the relatively liberal newspaper group Southern Metropolitan convicted of corruption (ch. 9 p. 245)*

*The case of dissident Du Daobin (ch. 9, p. 245)*

## **Appendix II**

### **Table of international treaties and protocols, national and local level laws, administrative regulations and rules, judicial interpretations, and other ‘normative documents’**

#### **1. International Treaties and Protocols**

*General Agreement on Tariffs and Trade (GATT)*  
(cited as of 1994)

*Protocol on The Accession of The People’s Republic Of China [to the WTO]*  
of 10 November 2001

*International Covenant on Civil and Political Rights (ICCPR)*  
(signed by China in 1998; not yet ratified)

#### **2. Legislation at National Level**

##### **2.1 NPC and NPC Standing Committee Legislation<sup>1</sup>**

*Constitution of the People’s Republic of China* (宪法) of 1999 (amended March 2004; also cited: constitutions of 1993, 1982, and 1954, cited in Chapters Five and Ten)<sup>2</sup>

*Administrative Litigation Law* (行政诉讼法), promulgated 4 April 1989

*Administrative Punishment Law* (行政处罚法), promulgated 17 March 1996

*Administrative Reconsideration Law* (行政复议法), promulgated 30 April 1999

*Administrative Permit Law* (行政许可法), promulgated 23 August 2003

*Administrative Supervision Law* (行政监察法) promulgated 9 May 1997

*Civil Procedure Law* (民事诉讼法), promulgated 9 April 1991

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<sup>1</sup> Here only the laws themselves are listed, but it is important to appreciate that judicial interpretations provided by the Supreme People’s Court and a number of other directives, guidelines and interpretations matter to how the laws are interpreted and applied (see Chapters Five and Seven). Collections of laws in print or online will usually contain the more important of these additional texts.

<sup>2</sup> In the following the phrase ‘The People’s Republic of China’s’ is left out in both languages. The dates are given as precisely as possible.

*Criminal Procedure Law* (刑事诉讼法), promulgated in amended form 17 March 1996

*Files Law* (档案法), promulgated in amended form 7 May 1996)

*Household Registration Statutes* (户口登记条例), promulgated 9 January 1958

*Judges' Law* (法官法), promulgated 28 February 1995

*Law on assemblies and demonstrations* (集会游行示威法), promulgated 31 October 1989; implementation guidelines promulgated 16 June 1992

*Lawyers' law*, (律师法), promulgated in amended form 29 December 2001

*Legislation Law* (立法法), promulgated 15 March 2000

*Marriage Law* (婚姻法), promulgated in amended form 28 April 2001

*Organic Law of the People's Courts* (法院组织法), promulgated in amended form 2 December 1986

*Organic Law of the State Council* (国务院组织法), promulgated 10 December 1982

*Principles of Civil Law* (民法通则), promulgated 12 April 1986

*State Compensation Law* (国家赔偿法), promulgated 12 May 1994

*Statutes on administrative punishments for public security and supervision purposes* (中华人民共和国治安管理处罚条例), promulgated 5 September 1986

## **2.2 State Council**

*Statutes for the Organisation of Mediation Committees*, State Council Order no. 37 (1989) published 17 June 1989

*Directives on Aid for the Homeless* (城市生活无着的流浪乞讨人员救助办法), State Council Order no. 381 (2003) published 20 June 2003

*Directives on Internment and Deportation* (城市流浪乞讨人员收容遣送办法), State Council order promulgated 12 May 1982

*Statutes on receiving letters and receiving visitors* (收信接防条例), State Council Order no. 185 (1995) promulgated 28 October 1995

*Statutes on the Filing of Regulations and Rules* (法规规章备案条例), State Council Order no. 337 (2001), promulgated 14 December 2001

*Legal Aid Statutes* (法律援助条例) State Council Order (2003) no. 385, promulgated 16 July 2003

*View on the reform of internment and Deportation Work* (关于收容遣送工作改革问题的意见), 1991

*Notification of approval on the Ministry of Public Security's Views on the handling of problems relating to the household registration* (国务院批转公安部关于解决当前户口管理工作中几个突出问题意见的通知), (1998) [circulation] no. 24

*Notification of approval on the Ministry of Public Security's Views on promoting the reform of the system of handling household registration in small cities and towns* (关于推进小城镇户籍管理制度改革的意见), approximately May 2001

### **2.3 Ministries (national level)**

Civil Affairs Ministry, *Specific guidelines for applying the Directives for Aid to the urban homeless* (城市生活无着的流浪乞讨人员救助管理办法实施细则), Civil Affairs Ministry Order no. 24, published 21 July 2003

Ministry of Health, *Provisional Rules of the Ministry of Health for handling letters and calls* (卫生部, 信访工作暂行条例), 16 July 1988 (?)

Ministry of Justice, *Measures for the disciplining and punishment of illegal conduct on the part of lawyers and law firms* (律师和律师事务所违法行为处罚办法) Ministry of Justice order no. 86 of 19 March 2004

Ministry of Public Security, *Directives regarding the application for temporary residence permits* (暂住证申领办法) Ministry of Public Security in 1995

Ministry of Public Security, *Views on promoting the reform of the system of handling household registration in small cities and towns* (关于推进小城镇户籍管理制度改革的意见), approximately May 2001, circulated with an 'approving notice' by the State Council

Ministry of Public Security, *Views on the handling of problems relating to the household registration* (关于解决当前户口管理工作中几个突出问题的意见) approved and circulates by State Council in 1998 (see above)

### **3. Local level legislation (Provincial and city level administrative regulations)**

Beijing City government's 13 June 1995 *Regulation on the Handling of the household registration of migrant workers coming to Beijing* (北京市外地来京人员户籍管理规定)

*Heilongjiang Province Guidelines (guiding) for carrying out internment and deportation on complainants* (黑龙江省信访收容遣送工作法规)

*Shanghai Regulations for the Handling of Internment and Deportation*

*Shenzhen SEZ Statutes for the Handling of Temporary Residence and Household Registration* (深圳经济特区暂住人员户口管理条例), amended, 9 April 1997

### **4. Judicial Interpretations and other documents issued by the Supreme People's Court<sup>3</sup>**

*Supreme People's Court's rules on relevant problems regarding judicial mediation work (Draft inviting comments)* (最高人民法院关于人民法院调解工作若干问题的规定(征求意见稿)), 10 February 2004

*Supreme People's Court's Rules for strictly enforcing the sanctions system of the Judges Law* (关于严格执行“中华人民共和国法官法”有关惩戒制度的若干规定), passed 10 June 2003 and published on 19 June 2003

*Supreme People's Court Rules on the application of the simplified civil procedure rules* (Zuigao fayuan guanyu shiyong jianyi chengxu shenli minshi anjian de ruogan guiding, 最高人民法院关于适用简易程序审理民事案件的若干规定法释), judicial interpretation (2003) no. 15

*Supreme People's Court's Rules on problems of handling People's Mediation settlement in civil litigation*, (最高人民法院关于审理涉及人民调解协议的民事案件的若干规定), judicial interpretation (2002) no. 29

*Supreme People's Court's (trial version) Rules on local and special court's court president and vice presidents taking the blame and resigning* (地方人民法院管及专门人民法院院长, 副院长引咎辞职规定 (试行)) of 7 November 2001

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<sup>3</sup> In chronological order, without classification as to the legal status of the document, because this status is sometimes unclear.

Supreme People's Court's *Basic Principles of Judicial Ethics* (法官职业道德基本准则) published 18 October 2001

Supreme People's Court's *Explanations on certain problems of determining and fine-tuning the grading of judges*, (关于法院等级评定和微调若干问题的解答) of 25 May 2000

Supreme People's Court's *Rules on problems of compensation in cases of administrative and civil litigation* (最高人民法院关于民事、行政诉讼中司法赔偿若干问题的解释), judicial interpretation (2000) no. 27

Supreme People's Court's *On problems relating to the application of the Administrative Litigation Law* (最高人民法院关于执行刑事诉讼法若干问题的解释), judicial interpretation (2000) no. 8

Supreme People's Court's 1998 *Notification of the Supreme People's Court's views on People's Courts receiving People's Congresses' and their Standing Committees' supervision* (最高人民法院关于 人民法院接受人民代表大会及其常务委员会监督的若干意见的通知), 24 December 1998

Supreme People's Court's *Directives on disciplinary sanctions in adjudication (trial version)* 人民法院审判纪律处分办法 (试行) 7 September 1998

Supreme People's Court's 1998 *Notification on the Publication of the trial version 'Directives for Holding Adjudicators who Adjudicate Unlawfully Responsible'* 关于 '人民法院审判人员违法审判责任追究办法 ' (试行) 的通知 no. (1998) 15, 26 August 1998

Supreme People's Court's *Directives for the Centre Handling Reports on Judges Having Contravened the Law or Contravened Professional Discipline* (最高人民法院法官违法违纪举报中心工作办法) 11 May 1998

Supreme People's Court's 1986 *Answer regarding the question how the courts when issuing legal documents should cite to normative documents* (最高人民法院关于人民法院制作法律文书应如何引用法律规范性文件的批复), Judicial Interpretation 1986 no 31 of 28 October 1986

Supreme People's Court's 1955 *Answer regarding the non-application of the Constitution as a basis for holding someone criminally responsible or measuring their punishment* (最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的批复 ), judicial interpretation (1955) reference number 11298, 30 July 1955

## 5. Other



Ministry of Justice and Supreme People's Court (joint notice), *On the relevant rules on the regulation of the relationship between judges and lawyers to ensure just adjudication* (关于‘规范法官和律师相互关系维护司法公正的若干规定’的通知) notice (2004) no. 9

Supreme People's Procuracy, *Regulation on Protecting the right of defence lawyers legally to perform their duties in criminal procedure* (关于人民检察院保障律师在刑事诉讼中依法执业的规定) SPP's judicial interpretation of 30 December 2003

Supreme People's Court, Supreme People's Procuracy and Ministry of Justice (jointly), *Provisional Measures on the State Law Exam* (国家司法考试实施办法 (试行)) issued 31 October 2001

*Notes on the Publication of the 'Provisional Regulations on the Grading of Judges'*, published jointly by the Communist Party's organisational and personnel department and the Supreme People's Court, 中共中央组织部 人事部最高人民法院关于印发 中华人民共和国 法官等级暂行规定 notification (197) no. 5 of 12 December 1997

### Appendix III. Chart of Chinese Legislation according to the Constitution and Legislation Law<sup>1</sup>

#### 1) National Level

The National People's Congress	('basic' or 'fundamental' laws)	基本法律, <i>jiben falü</i>
The NPC's Standing Committee	(amendments to and alterations of laws; 'non-fundamental' laws)	法律, <i>falü</i>
The State Council	Administrative regulations (nationwide)	行政法规, <i>xingzheng fagui</i>
The Ministries under the State Council	Ministerial (administrative) rules	部门规章, 部委规章, <i>bumen/buwei guizhang</i> (= a form of 行政规章, <i>xingzheng guizhang</i> )

#### 2) Local Levels<sup>2</sup>

##### a) Provinces

Provincial Level People's Congresses and their Standing Committees	Local regulations	地方性法规, <i>difangxing fagui</i>
Governments at provincial levels	Local government (administrative) rules	地方人民政府规章, <i>difang renmin zhengfu guizhang</i> (a form of 行政规章, <i>xingzheng guizhang</i> )

##### b) Provincial level (other)

Autonomous regions' legislatures AND Auton. prefectures or counties ( <i>xian, zhou</i> )	Autonomous regulations AND separate regulations	自治条例, <i>zizhi tiaoli</i> AND 单行条例, <i>danxing tiaoli</i>
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##### c) City level (legislation with approval from higher level)

Greater Cities' People's Congresses	Local regulations	地方性法规, <i>difangxing fagui</i>
Greater Cities' governments	Local government rules	地方人民政府规章, <i>difang renmin zhengfu guizhang</i>

<sup>1</sup> This chart helps to understand the way legislation in China (both by the central and local governments, and by the People's Congresses and their Standing Committees) is supposed to happen. Many 'normative documents' are issued by other entities and many have different names than those listed.

<sup>2</sup> For the complex provisions on local level legislation see Chapter 4, sections 1 and 2 (Articles 63 ff.) of the *Legislation Law*. See also *Organisation Law of the State Council*.

## **Appendix IV. Table of Abbreviations**

<b>ACLA</b>	<b>All China Lawyers' Association</b>
<b>BVerfGG</b>	<b>Bundesverfassungsgerichtsgesetz, Organic Law of the [German] Federal Constitutional Court</b>
<b>CPC</b>	<b>Communist Party of China</b>
<b>CIETAC</b>	<b>China International Economic and Trade Arbitration Commission</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>
<b>IWLO</b>	<b>'Ideal Western Legal Order'</b>
<b>NPC</b>	<b>National People's Congress</b>
<b>MoJ</b>	<b>Ministry of Justice</b>
<b>SPC</b>	<b>Supreme People's Court</b>
<b>SPP</b>	<b>Supreme People's Procuracy</b>

## Bibliography<sup>1</sup>

### Books

**Administrative Supervision Law and Complementing Provisions** (*Xingzheng jianchafa jiqi peitao guiding* (行政监察法及其配套规定, China Legal System Press (中国法制出版社): Beijing, 2002)

**Alston, Philip**, *Human Rights Law* (Dartmouth: Aldershot, 1996)

**Angle, Stephen**, *Human Rights in Chinese Thought: A Cross- Cultural Inquiry* (Cambridge University Press: Cambridge, 2002)

**Aristotle**, *Nicomachean Ethics*, Cambridge University Press edition by Roger Crisp (Cambridge University Press: Cambridge, 2000)

**Bell, Daniel**, and **Hahm Chaibong**, *Confucianism for the Modern World* (Cambridge University Press: Cambridge, 2003)

**Berlin, Isaiah**, *Four Essays on Liberty* (Oxford University Press, Oxford: 1969)

**Bodde, Derk**, and **Morris, Clarence**, *Law in Imperial China. Exemplified by 190 Ch'ing Dynasty Cases* (Harvard University Press/Harvard Studies in East Asian Law 1: Cambridge, Massachusetts 1967)

**Cohen, Jerome Alan**, *The Criminal Process in The People's Republic Of China 1949-1963. An Introduction* (Harvard University Press: Cambridge, Massachusetts, 1968)

**Coleman, Jules** (editor), *Hart's Postscript* (Oxford University Press: Oxford, 2001)

**Confucius (Kongzi, 孔子)** *Analects (Lunyu, 论语)*. Translations used:

- Dawson, Raymond, *Confucius. The Analects* (Oxford, New York: 1993)
- Cai Xiqin, Lai Bo and Xia Yuhe (蔡希勤, 赖波, 夏玉和, translators and annotators), *Confucius. The Analects* (Huayu Jiaoxue Press (华语教学出版社), *Chinese Sages Series* (中国胜任文化丛书), Beijing: 1994)
- translation available at <http://www.wsu.edu:8080/%20~dee/CHPHIL/ANALECTS.HTM>.

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<sup>1</sup> This bibliography is organised according to author's name (for Chinese names, in Latin transliteration) and where no author was stated, according to the name of the publisher (all newspaper articles) or title (books), as appropriate.

- Davis**, Michael C. (editor), *Human Rights and Chinese Values* (Oxford University Press: Hong Kong, Oxford: 1995)
- Dworkin**, Ronald, *Law's Empire* (Harvard University Press: Cambridge, Massachusetts, 1986)
- Dworkin**, Ronald, *Taking Rights Seriously* (Duckworth: London, 1977)
- Fairbank**, John King, and **Goldman**, Merle, *China. A New History* (Harvard Belknap: Cambridge, Massachusetts, 1999)
- Finnis**, John, *Natural Law and Natural Rights* (Oxford University Press: Oxford, 1980)
- Fung** (Feng) Yu-lan, *A Short History of Chinese Philosophy*, edited by Derk Bodde (Macmillan: New York, 1948; paperback reprint, The Free Press: New York, 1966)
- Freeman**, Michael, *Lloyd's Introduction to Jurisprudence* (7<sup>th</sup> edition, Sweet & Maxwell: London, 2001)
- Freeman**, Michael (editor) *Alternative Dispute Resolution* (New York University Press: New York, 1995)
- Gerke**, Wolfgang, *Die Schlichtung im chinesischen Recht (Mediation in Chinese Law)* (Hamburg: 1992)
- Habermas**, Jürgen, *Faktizität und Geltung (Between Facts and Norms)*, Suhrkamp Verlag: Frankfurt a.M., 1992)
- Hart**, Herbert, *The Concept of Law* (2<sup>nd</sup> edition, Oxford University Press: Oxford, 1994)
- Huang**, Philip, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford University Press: Stanford, 2001)
- Hsu**, Stephen, (editor) *Understanding China's Legal System. Essays in Honour of J.A. Cohen* (New York University Press: New York, 2003)
- Jiang Shigong** (强世功, editor), *Mediation, Legality and Modernity: Mediation in China (tiaojie, fazhi yu xiandaixing: zhongguo tiaojie zhidu yanjiu, 调解, 法制与现代性: 中国调解制度研究)* (Law Press (法律出版社): Beijing, 2001)
- Jiang Yong** (蒋勇, editor), *Exemplary administrative litigation cases (Dianxing xingzheng susong anli, 典型行政诉讼案例 评析)*, Law Press (法律出版社): Beijing, 2000)

**Jin Weifeng**, (金伟峰, editor), *China's system of coercive administrative measures* (*Zhongguo xingzheng qiangzhi falü zhidu*, 中国行政强制法律制度, Law Press (法律出版社): Beijing, 2002)

**Judges Law and Complementary Provisions** (*Faguanfa jiqi peitao guiding* (法官法及其配套规定, China Legal System Press: Beijing, 2001)

**Kant**, Immanuel, *Metaphysics of Morals* (*Metaphysik der Sitten*, Koenigsberg: 1785); citations from:

(1) [http://www.4literature.net/Immanuel\\_Kant/Science\\_of\\_Right/2.html](http://www.4literature.net/Immanuel_Kant/Science_of_Right/2.html) and

(2) Reiss (editor), *Kant. Political Writings* (2<sup>nd</sup> edition, Cambridge University Press: Cambridge, 1991)

**Kripke**, Saul, *Naming and Necessity* (Harvard University Press: Cambridge Massachusetts, 1980)

**Leng**, S. C., *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* (Oceana Publications: Dobbs Ferry, 1967)

**Li Chunlin** (李春林), *Handbook on People's mediation* (*Renmin tiaojie shouce*, 人民调解手册, Beijing Press (北京出版社): Beijing, 1989)

**Liu**, Shu-Hsien, in *Understanding Confucian Philosophy* (Praeger: Westport, 1998)

**Lu Tianming** (陆天明) *The Provincial Party Secretary* (*Shengwei shuji*, 省委书记, Chunfeng Wenyi Press (春风文艺出版社): Beijing, 2002)

**Lubman**, Stanley, *Bird in a Cage* (Stanford University Press: Stanford: 1999)

**Lubman**, Stanley (editor), *China's Legal Reforms* (Clarendon, Oxford University Press: New York, 1996)

**Luo Haocai** (罗豪才, general editor), *Theory of Administrative Law* (*Xingzhengfaxue*, 行政法学, Beijing University Press (北京大学出版社): Beijing, 2001)

**Macauley**, Melissa, *Social Power and Legal Culture. Litigation Masters in Late Imperial China* (Stanford University Press: Stanford, 1992)

**Macintyre**, Alasdair, *After Virtue: A Study in Moral Theory* (Notre Dame: 1981)

**Mathews'** Chinese-English Dictionary, revised American edition (Caves: Cambridge, Massachusetts, 1943)

**Montesquieu**, Charles de Secondat, *De l'esprit des lois* (Paris: 1748), translation by P. Nugent (1752) available at <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/montesquieu/spiritoflawspdf>

- Nagel, Thomas**, *Equality and Partiality* (Oxford University Press: Oxford, 1992)
- Nietzsche, Friedrich**, *Genealogy of Morality* (*Zur Genealogie der Moral*, Leipzig: 1887)
- Peerenboom, Randall**, *Lawyers in China: Obstacles to Independence and the Defense of Rights* (Lawyers' Committee on Human Rights: New York, 1998)
- Peerenboom, Randall**, *China's Long March Toward Rule of Law* (Cambridge University Press: Cambridge, 2002)
- Potter, Pitman B.**, *The Chinese Legal System: Globalisation and local legal culture* (Routledge: London, New York, 2001)
- Prinz, Peters**, *Medienrecht: die zivilrechtlichen Ansprüche* (Beck Verlag: München, 1999)
- Putnam, Hilary**, *Reason, Truth and History* (Cambridge University Press: Cambridge, 1981)
- Rawls, John**, *A Theory of Justice* (The Belknap Press of Harvard University Press: Cambridge, Massachusetts, 1971)
- Raz, Joseph**, *The Concept of a Legal System - An Introduction to the Theory of a Legal System* (2<sup>nd</sup> edition, Oxford University Press: Oxford, 1980)
- Raz, Joseph**, *The Authority of Law* (Oxford University Press, Oxford: 1979)
- Raz, Joseph**, *The Morality of Freedom* (Oxford University Press: Oxford, 1986)
- Raz, Joseph**, 'Authority, Law, and Morality', *Ethics in the Public Domain* (Oxford: 1996)
- Raz, Joseph**, *Engaging Reason* (Oxford University Press: Oxford, 1999)
- Rossett, Arthur, Lucie Cheng and Margaret Woo** (editors), *East Asian Law – Universal Norms and Local Cultures* (Routledge Curzon: London and New York, 2003)
- Rouner, Leroy S.** (editor), *Human Rights and the World's Religions*. ed. (University of Notre Dame Press: Notre Dame, 1988)
- Scanlon, Thomas**, *What We Owe To Each Other* (Harvard University Press: Cambridge, Massachusetts, 1998)
- Schram, Stuart R.**, *The Thought of Mao Tse-Tung* (Cambridge University Press, Cambridge: 1989)
- Sen, Amartya, and Williams, Bernard**, *Utilitarianism and Beyond* (Cambridge University Press: Cambridge, 1982)

**Simmonds, Nigel**, *Central Issues in Jurisprudence* (2<sup>nd</sup> edition, Cambridge University Press: Cambridge, 2002)

**Song Yinghui**, (宋英辉), *Introduction to the Elements of Criminal Procedure* (*Xingshi Susong Yuanli Daodu*, 刑事诉讼原理导读, Law Press (法律出版社): Beijing, 2003)

**Spence, Jonathan D.**, *Mao Zedong* (Penguin Lives: London, 2001)

**Stavropoulos, Nicos**, *Objectivity in Law* (Oxford University Press: Oxford, 1998)

**Sun Juyou** (孙聚友), *New Theory of the Confucian Philosophy of Management* (*Rujia guanli zhexue xinlun*, 儒家管理哲学新论, Qilu Book Society (齐鲁书社): Jinan, 2003)

**Sun Liping** (孙立平), *Cleavage: Chinese society since the 1990s* (*Duanlie: Ershi shiji jiushiniandai yilai de Zhongguo shehui* 断裂: 20 世纪 90 年代以来的中国社会, Social Sciences Documents Publication House (社会科学文献出版社): Beijing, 2003)

**Svensson, Marina**, *Debating Human Rights in China: A Conceptual and Political History* (Rowman & Littlefield, Lanham and Oxford: 2002)

**Tan Shigui** (谭世贵), *On the prevention of corruption in the administration of justice* (*Sifa fubai fangzhi lun*, 司法腐败防治论, (Law Press (法律出版社): Beijing, 2003)

**The Concise English-Chinese Chinese-English Dictionary** (The Commercial Press (商务印书馆) and Oxford University Press: Oxford/Beijing, 1986)

**The Contemporary Chinese Dictionary** (Foreign Language Teaching and Research Press (外语教学与研究出版社): Beijing, 2002)

**Tuck, Richard**, *Natural Rights Theories: Their Origin and Development* (Cambridge University Press: Cambridge, 1979)

**Van der Sprenkel, Sybille**, *Legal Institutions in Manchu China: a sociological analysis* (Athlone Press: London, 1962)

**Waldron, Jeremy**, *Liberal Rights. Collected papers 1981-1991* (Cambridge University Press: Cambridge, 1993)

**Waldron, Jeremy** (editor), *Theories of Rights* (Oxford University Press: Oxford, 1984)

**Wang Chenguang, Zhang Xianchu** (editors), *Introduction to Chinese Law* (Sweet & Maxwell Asia: Hong Kong and Singapore, 1997)



**Wang Zhenmin** (王振民), *Casebook on Constitutional Law*, Tsinghua University Law School (*Zhongguo xianfa anli jiaocheng, Qinghua Daxue faxueyuan*, Beijing 2002 nian ba yue, 中国宪法案例教程, 清华大学法学院, 北京, 2002 年 8 月, unpublished, Beijing: August 2002)

**Wiggins, David**, *Needs, Values, Truth* (Oxford University Press: Oxford, 1987)

**Williams, Bernard**, *Ethics and the Limits of Philosophy* (Fontana Press: London, 1985)

**Woodiwiss, Anthony**, *Making Human Rights Work Globally* (Glasshouse: London, Sydney, 2003)

**Xia Yong** (夏勇, editor) *Toward a Time of Rights: A Perspective of the Civil Rights Development in China* (*Zouxiang quanli de shidai: zhongguo gongmin quanli Fazhan Yanjiu*, 走向权利的时代: 中国公民全力发展研究) (China University of Politics and Science Press (中国政法大学出版社): Beijing, 1999)

**Xue Lan, Zhang Qiang and Zhong Kaibin** (薛澜, 张强, 钟开斌), *Crisis Management* (*Weiji guanli*, 微机管理, Tsinghua University Press (清华大学出版社): Beijing, 2003)

**Ying Songnian** (应松年) and **Yuan Shuhong** (袁曙宏), *Toward Government under the Rule of Law* (*Zouxiang fazhi zhengfu*, 走向法制政府, Law Press (法律出版社): Beijing, 2001)

**Zhou Wei** (周伟, editor), *Study on the Judicial Protection of Constitutional Rights* (*Xianfa jiben quanli sifa jiuji yanjiu*, 宪法基本权利司法救济研究), Chinese People's Public Security University Press (中国人民公安大学出版社): Beijing, 2003)

## Articles

**Agence France-Presse** article, 'Two More Suicide Attempts on Beijing's Tiananmen Square' at <http://english.epochtimes.com/news/3-10-22/11560.html>

**Alford, William P.**, 'Of Lawyers Lost And Found: Searching for legal professionalism in the People's Republic of China', in Arthur Rossett, Lucie Cheng and Margaret Woo (editors), *East Asian Law –Universal Norms and Local Cultures* (Routledge Curzon: London and New York, 2003)

**Ames, Roger**, 'Rites as Rights: The Confucian Alternative', in Rouner (editor), *Human Rights and the World's Religions*. ed. (University of Notre Dame Press: Notre Dame, 1988)

**Amnesty International** report, 'Executed According to Law?', March 2004, available at <http://web.amnesty.org/library/index/engasa170032004>

**Angle**, Stephen, 'Did Someone Say "Rights"? Liu Shipei's Concept of *Quanli*', 48 (1983) *Philosophy East and West* 623

**Aubert**, Vilhelm, 'Competition and dissensus: two types of conflict and of conflict resolution' (1963), in Freeman, Michael (editor) *Alternative Dispute Resolution* (New York University Press: New York, 1995)

**Bao Limin** (包丽敏), 'An old resident of Chongwen district in Beijing resists the coerced eviction and demolition of his home with a copy of the constitution in his hand (*Beijing Chongwen qu yi ming lao ren shouchi xianfa dizhi qiangzhi banqian*, 北京崇文区一名老人手持《宪法》抵制强制搬迁)', 5 April 2004, available at [http://news.xinhuanet.com/legal/2004-04/05/content\\_1400429.htm](http://news.xinhuanet.com/legal/2004-04/05/content_1400429.htm)

**Berlin**, Isaiah, 'Two Concepts of Liberty', in his *Four Essays on Liberty* (Oxford University Press, Oxford: 1969)

**BBC** report 'The corrupt comrade', at <http://news.bbc.co.uk/1/hi/world/asia-pacific/143163.stm>

**BBC** (Chinese version), Chinese courts cooperate in the protection of private property (*Zhongguo fayuan peihe baohu siyouchanquan*, 中国法院配合保护私有产权) at [http://news.bbc.co.uk/hi/chinese/news/newsid\\_3498000/34984041.stm](http://news.bbc.co.uk/hi/chinese/news/newsid_3498000/34984041.stm)

**Beach**, Sophie, 'A dismal chapter in China's media history', posted at <http://journalism.berkeley.edu/projects/chinadn/en/archives/002406.html>

**Cao Yongwen** (曹勇文), 'An investigation into the true story of the trading of people at Hunan Lianyuan's internment station (*Hunan Lianyuan shourongzhan "mairen mairen" xiangzhen diaocha*, 湖南涟源收容站"买人卖人"真相调查, summer 2003, undated, available at <http://www.phoenixtv.com.cn/home/phoenixweekly/116/48page.html>

**Chen Feng** (陈峰), 'A former internment station [party] secretary lifts the dark curtain to make revelations about internment: over a million Yuan extorted in 6 years' (*Qian shourong shuji pilu shouronog heimu: liu nian sougua shang bai wan yuan*, 前收容站书记披露收容黑幕 : 6 年搜刮上百万元), in *Southern Metropolitan* (南方都市报), 19 June 2003, at [http://news.xinhuanet.com/legal/2003-6/19/content\\_945548.htm](http://news.xinhuanet.com/legal/2003-6/19/content_945548.htm)

**Chen Jun** (陈军), 'The law does not recognise the principle of punishing one's relatives to uphold justice (*Falü bu ren "da yi mie qin"*, 法律不认"大义灭亲")' 12 May 2004, available at [http://news.xinhuanet.com/legal/2004-05/12/content\\_1465070.htm](http://news.xinhuanet.com/legal/2004-05/12/content_1465070.htm)

**Chen Ruihua** (陈瑞华), 'Major Issues Concerning the Reform of Criminal Judicature in China' (2000?) translated by Yang Yushen and revised by David Kelly, published in English at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=1720](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1720). (No date of publication given)

**Chen Ruihua** (陈瑞华), 'Thinking according to a lawyer's mode of thinking (*falü ren de siwei*, 法律人的思维)', public lecture at Beijing University Law School, 22 October 2003

**Chen Sixi** (陈斯喜) and **Tong Weidong** (童卫东), 人大立法推动依法行政掉咱报告 in Ying Songnian (应松年) and Yuan Shuhong (袁曙宏), *Toward Government under the Rule of Law* (*Zouxiang fazhi zhengfu*, 走向法制政府, Law Press (法律出版社): Beijing, 2001)

**Chen Xuan** (徐璇), 'Shanghai: an end to the tasks of 'no. 936'? (*Shanghai: 936 renwu de zongjie?*, 上海: 936 任务的终结?, *Southern Weekend* (南方周末), 26 June 2003, at <http://cul.sina.com.cn/s/2003-06-27/37117.html>

**Chen Yu** (陈宇), 'Chongqing: arrested suspects will only be taken away into detention after they have been given a head mask (*Chongqing: zhuahuo xianfan daizhe touzhao cai yazou*, 重庆: 抓获嫌犯戴着头罩才押走), 5 February 2004, available at <http://www.southcn.com/law/fzsytp/200402060091.htm>

**Chen Yuanzheng** (臣远征), 'Transcript of Professor He Weifang's speech - the epochal task of the Chinese lawyer (*He Weifang jiaoshou yanjiang shilu - zhongguo lüshi de shidai shiming* 贺卫方教授演讲实录——中国律师的时代使命)', available at <http://forum.acla.org.cn/showflat.php?Board=22&Number=450759>

**Cheng Jie** (程洁), 'Three philosophical sources of constitutionalism (*Lixian zhuyi de san zhong sixiang yuanliu*, 立宪主义的三种思想源流), (undated) at <http://www.gongfa.com/chengjielixianzhuyisanchaoliu.htm>

**Cheng Jie** (程洁), 'How to understand court supervision by local People's congresses (*Ruhe lijie difang renda dui fayuan de jiandu*, 如何理解地方人大对法院的监督)' in *21st Century Economic Herald* (21 世纪经济报道), 5 December 2003, at <http://www.people.com.cn/GB/14576/15157/2230127.html>

**Chengdu City Intermediate Court**, 'Guide to Litigation - How to Apply for a re-trial (*Susong zhinan zhishi - shenqing zaishen*, 诉讼指南知识----申请再审)', obtained on 8 September 2003

**China Daily Hong Kong Edition**, 'Tragedy spurs end to 21-year-old rule on vagrants', 19 June 2003, available at [http://www.chinadaily.com.cn/en/doc/2003-06/20/content\\_239912.htm](http://www.chinadaily.com.cn/en/doc/2003-06/20/content_239912.htm)

**China Economic Times** (中国经济时报), 'Reflections on the legal difficulties in adjudicating Sun Zhigang's case in first instance – in order to attack bad law [efa] we must uphold the Constitution [xianfa] (*Fansi Sun Zhigang an yi shen falü kunjing , daji efa yao taichu xianfa*, 反思孙志刚案一审法律困境 打击恶法要抬出宪法)', 11 June 2003, available at <http://www.sina.com.cn>

**China Internet Information Center**, introduction to the 'Three Represents' at <http://www.china.org.cn/english/zhuanti/3represents/68735.htm>

**China Law and Governance Review**, 'Luoyang City "Seed" Case Highlights Chinese Courts' Lack of Authority to Declare Laws Invalid' (2004) *China Law and Governance Review* (June issue; author not named)

**Chinalawnet**, report, 'The case of criminal procedure court compensation for Huang Jingxia (*Huang Jingjia gujia xingshi peichang an*, 黄景嘉国家刑事赔偿案)', available at <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=cas&Gid=33554843>

**China Today** on the communist Party of China information available at <http://www.chinatoday.com/org/cpc/>

**Chinesenewsnet**, 'National Minister for Letters and Complaints: 80% of complaints visits reasonable (*Guojia xinfangju juzhang: 80% shangfang you daoli*, 國家信訪局局長：80%上訪有道理)', available at [http://www7.chinesenewsnet.com/MainNews/SinoNews/Mainland/xhw\\_2003\\_11\\_20\\_00\\_25\\_52\\_838.htm](http://www7.chinesenewsnet.com/MainNews/SinoNews/Mainland/xhw_2003_11_20_00_25_52_838.htm)

**Clarke, Donald**, 'Dispute Resolution in China', (1991) 5 *Journal of Chinese Law* [succeeded by *Columbia Journal of Asian Law*] (no. 2) 245

**Clarke, Donald and Feinerman, James**, 'Antagonistic Contradictions - Criminal Law and Human Rights in China', (1995) 141 *The China Quarterly* 135-154

**Clarke, Donald**, 'When is a Riddle Just a Mistake', in Hsu, Stephen, (editor) *Understanding China's Legal System. Essays in Honour of J.A. Cohen* (New York University Press: New York, 2003)

**Cohen, Gerry A.**, 'Freedom and Money', paper for UCL Colloquium, 11 January 1999

**Cohen, Jerome Alan**, 'Chinese Mediation on the Eve of Modernization', (1966) 54 *California Law Review* 1201

**Congressional Executive Commission on China**, 'Defense Lawyers Turned defendants: Zhang Jianzhong and the Criminal Prosecution of defense lawyers in China'', available at [http://www.cecc.gov/pages/news/zhang\\_052703.php](http://www.cecc.gov/pages/news/zhang_052703.php) and <http://www.cecc.gov/pages/news/zhangupdate.php>

**Ding Xiuzhi and Zhang Zhiwei** (丁秀枝, 张志伟), 'Our view on perfecting the letters and complaints system in courts (*Wanshan fayuan xinfang zhidu zhiwojian*, 完善法院信访制度之我见), 31 March 2004, available at <http://www.chinacourt.org/public/detail.php?id=109647>

**Dowdle, Michael**, 'Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: the Curious Case of China', 35 (2002) *New York University Journal of International Law and Politics* 1

**Du Gangjian, Song Gang**, 'Relating Human Rights to Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence', in Davis, Michael C. (editor), *Human Rights and Chinese Values* (Oxford University Press: Hong Kong, Oxford: 1995)

**Du Yulu and Yang Yemao** (杜裕禄, 杨叶茂), 'Thoughts on the establishment of a system of precedent with guidance function in China (*dui jianli woguo panli zhidao zhidu zhi sikao*, 对建立我国判例指导制度之思考)', available at <http://www.chinacourt.org/public/detail.php?id=109555>

**Dworkin, Ronald**, 'What Rights Do We Have?', in *Taking Rights Seriously* (Duckworth: London, 1977)

**Dworkin, Ronald**, 'The Model of Rules I' and 'II', chapters 3 and 4 in his *Taking Rights Seriously* (Duckworth, London, 1977).

**Dworkin, Ronald**, 'What Is Equality? Parts 1-4, especially Part 1. Reprinted in *Sovereign Virtue* (Harvard: 2000)

**Dworkin, Ronald**, 'Taking Rights Seriously in Beijing', (2002) *New York Review of Books* (September issue) 46

**Dyzenhaus**, 'The Genealogy of Legal Positivism', 24 (2004) *Oxford Journal of Legal Studies* 39

**Fan Fu** [a pen name] (凡夫), 'Looking back at 20 years of administrative litigation: the attitude of "even in cases of humiliation or death one must not litigate against officials" is becoming a thing of the past (*Wo guo xingzheng shenpan 20 nian huigu: "qusi bu gao guan!" cheng wang shi*, 我国行政审判 20 年回顾: "屈死不告官"成往事)', available at [http://news.xinhuanet.com/legal/2004-02/23/content\\_1327635.htm](http://news.xinhuanet.com/legal/2004-02/23/content_1327635.htm)

**Fang Liufang** (方流芳), 'Taking the rules of the academic game seriously - some sentiments upon reading the reports of Dworkin's visit to China (*Ruhe renzhen de kandai xueshu youxi* 如何认真地看待学术游戏——读德沃金访华报告有感)', available at [http://www.oycf.org/Perspectives/Chinese/Chinese\\_9\\_01312003/FangLiuFang.htm](http://www.oycf.org/Perspectives/Chinese/Chinese_9_01312003/FangLiuFang.htm)

**Fiss, Owen**, 'Against Settlement' (1984), chapter nine in Freeman, Michael (editor), *Alternative Dispute Resolution* (New York University Press: New York, 1995)

**Fuller, Lon**, 'The Forms and Limits of Adjudication' (1978), chapter one in Freeman, Michael (ed.), *Alternative Dispute Resolution* (New York University Press: New York, 1995)

**Fuller, Lon**, 'Mediation – its Forms and Functions', (1971) 44 *Southern California Law Review* 305

**Gallie, William P.**, 'Essentially Contested Concepts', (1955-56) 86 *Proceedings of the Aristotelian Society* 167

**Gelatt, Timothy A.**, 'The People's Republic of China and The Presumption of Innocence', 73 (1982) *Journal of Criminal Law and Criminology* 259

**Gu Ruizhen** (顾瑞珍), 'The Supreme People's Procuracy reiterates its guarantee of protection for the rights of the criminal defence lawyers (*Gaojian sifabu chongshen quebao xingshi bianhu lüshi yifa zhiye de quanli* (高检司法部重申确保刑事辩护律师依法执业的权利)', available at [http://news.xinhuanet.com/legal/2004-03/11/content\\_1360818.htm](http://news.xinhuanet.com/legal/2004-03/11/content_1360818.htm)

**Guest, Stephen**, 'Why The Law Is Just', (2000) *Current Legal Problems* 31

**Guo Guosong** (郭国松), 'Remote courts: resources lacking within, rescuing forces lacking without (*Bianyuan fayuan: nei que liangcao, wai que jiu bing*, 边远法院: 内缺粮草, 外缺救兵)', *Southern Weekend* (南方周末), 21 August 2003, at <http://www.nanfangdaily.com.cn/zm/20030821/xw/shxw/200308210924.asp>

**Guo Wei** (郭伟), 'Rural local courts should emphasise mediation more' (*nongcun jiceng fating gengjia yao zhong tiaojie* 农村基层法院更加要重调解), 30 April 2004, available at <http://www.chinacourt.org/public/detail.php?id=113763>

**Guo Zhixia** (郭志霞), 'Ten years after promulgation of the *State Compensation Law*, 35 cases concluded in Beijing (*Guojia peichangfa banbu shinian, Beijing shenjie 35 jian guojia peichang*, 国家赔偿法》颁布十年 北京审结 35 件国家赔偿)', 11 May 2004 at [http://news.xinhuanet.com/legal/2004-05/11/content\\_1461641.htm](http://news.xinhuanet.com/legal/2004-05/11/content_1461641.htm)

**Hall, David**, and **Ames, Roger**, 'A Pragmatist Understanding of Confucian Democracy', in Bell, Daniel, and Hahm Chaibong, *Confucianism for the Modern World* (Cambridge University Press: Cambridge, 2003)

**Han Zhe** (韩哲), 'The dividing line between court independence and the power of the People's Congresses to supervise (*Fayuan duli shenpanquan he renda*

*jianduquan de bianjie*, 法院独立审判权和人大监督权的边界), 20 November 2003 *21<sup>st</sup> Century Herald* (21 世纪经济报道) <http://www.nanfangdaily.com.cn/jj/20031120/jd/200311190598.asp>

**Hansen**, Chad, 'The Asian Values Debate and the Moral Synthesis Goals of Comparative Philosophy', online at <http://www.hku.hk/philodep/ch/aparights.html>

**Hart**, Herbert L.A., 'Are there any natural rights?', chapter three in Waldron, Jeremy (editor), *Theories of Rights* (Oxford University Press: Oxford, 1984). (first published in *The Philosophical Review* vol. LXIV no. 2 (April 1955), pp. 175-91

**Hart**, Herbert L.A., 'Legal rights', in *Essays on Bentham, Studies in Jurisprudence and Political Theory* (Oxford: 1982), p. 162

**Hart**, Herbert L.A., 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream', *Essays in Jurisprudence and Philosophy* (Oxford University Press, Oxford: 1983)

**He Jiahong** (何家弘), contribution to 'Law online: torture (*Fazhi zai xian: xingxun bigong*, 法制在线：刑讯逼供)', *Renminwang*, 22 October 2003, at <http://www.people.com.cn/GB/14576/15157/2146427.html>

**He Sanwei** (何三畏), 'The meaning of "allowing people to say wrong things" ("Yunxu shuocuo hua" de yiyi, "允许说错话"的意义)', 3 March 2004 in *Nanfang Zhoumo*, available at <http://www.nanfangdaily.com.cn/zm/20040226/xw/tb/200402260001.asp>

**He Shang** (程尚, a pen name), 'why do the "problematic documents" make up 19 percent? (*Wenti wenjian" weihe zhan 19 %*, "问题文件" 为何占了 19%)' *Southern Weekend* (南方周末), 7 July 2003

**He Qinglian**, 'Where is the Boom of the Chinese Real Estate Industry Coming From?', published in *Epoch Times* of 8 May 2004, , five-part article posted at <http://english.epochtimes.com/news/4-5-9/21289.html>

**He Weifang** (贺卫方), 'Building up a transparent court (*Jianshe touming fayuan*, 建设透明法院), *Southern Weekend* (南方周末), 24 August 2003

**He Weifang** (贺卫方), 'Eight great difficulties with judicial reform (*Sifa gaige de ba da nanti*, 司法改革八大难题), 2001, posted 30 April 2003 at <http://www.legaltheory.com.cn/info.asp?id=3444>

**He Weifang** (贺卫方)/ **Chen Yuanzheng** (臣远征), 'Transcript of Professor He Weifang's speech - the epochal task of the Chinese lawyer (*He Weifang jiaoshou yanjiang shilu - zhongguo lüshi de shidai shiming* 贺卫方教授演讲实

录——中国律师的时代使命 )', available at <http://forum.acla.org.cn/showflat.php?Board=22& Number=450759>

**Horsley, Jamie P.**, 'A Legal Perspective on the Development of Electoral Democracy in China: The Case of Village Elections,' in Hsu, Stephen (editor), *Understanding China's Legal System* (New York University Press, New York: 2003)

**Huang Guangming (黄广明)**, 'Xiangfan Officialdom – a thunderstorm of anticorruption measures in Xiangfan, Hubei Province: over 70 officials collectively suspected of crimes (*Xiangfan guanchang – Hubei sheng xiangfan fanfu fengbao: 70 yu ming guanyuan jiti she'an*, 襄樊官场 --- 湖北襄樊反腐风暴: 70 余名官员集体涉案, *Southern Weekend*, 30 October 2003, at <http://www.nanfangdaily.com.cn/zm/20031030/xw/tb/200310300957.asp>

**Huang Songyou (黄松有)** in 'The judicialisation of the constitution and what it means – a discussion proceeding from the Supreme People's court's "approving response" today (*Xianf sifahu jiqi yiyi – cong zuigao renmin fayuan jintian de yige "pifu" tanqi*, 宪法司法化及其意义——从最高人民法院今天的一个《批复》谈起, 13 August 2001, available at <http://www.gongfa.com/huangsyxianfa sifahua.htm>.

**Hou Xiao (侯晓)** interview with Fang Jiamin in *Legal Services News* (法律服务时报) of 22 August 2003 at page 13

**Human Rights Watch**, 'China: Tenant Rights Advocate Arbitrarily Jailed. Lawyer Accused of circulating Secrets? to Rights Group', 19 December 2003, available at <http://hrw.org/english/docs/2003/12/18/china6762.htm>.

**Human Rights Watch in China**, 'Demolished: Forced Evictions and the Tenants' Rights Movement in China', March 2004, available at <http://hrw.org/reports/2004/china0304/>.

**Isensee, Josef**, 'Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht', paragraph 111 in *Handbuch des Staatsrechts* (CF Mueller Verlag: Heidelberg, 2000)

**Ji Weidong 季卫东**, '*Fazhi yu tiaojie de beilun* 法制与调解的悖论' [trans. The Conflict [rather contradiction] between Legal System and Mediation'], *Faxue Yanjiu* 法学研究 1989 no.5, 21

**Jiang Shigong (强世功)**, 'Misconceptions regarding the judicialisation of the constitution – discussion of the self-contradiction in the ideas of a national transformation and constitutionalism, proceeding from the self-contradictory discourse on the judicialisation of the constitution, (*Xianf sifahua de "wuqu" – cong "xianfa sifahua" de beilun kan guojia zhuanxing xianzheng beilun*, , 宪法司法化的“误区” - 从“宪法司法化”的话语悖论看国家转型的宪政悖论 )',



2003, at [http://article.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=23563](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23563)

**Jiao Guobiao** (焦国标), 'Fourteen reasons to attack the Propaganda Department (*Taofa zhongxuanbu de shisige liyou*, 讨伐中宣部的十四个理由), available at <http://beijingspring.com/c7/xw/wlwz/20040329191737.htm>

**Junhe Law firm Communist Party Branch**, report entitled 'Actively promoting the party branch's work by exploring the spirit of reform (*Yi tansuo gaige de jingshen jiji tuijin dangzhibu gongzuo - Beijing shi Junhe lüshishiwusuo dangzhibu*, 以探索改革的精神积极推进党支部工作——北京市君合律师事务所党支部)', available at <http://www.bjsf.gov.cn/Article/detail.asp?UNID=6954>

**Landsberger, Stefan**, 'Deng Xiaoping Theory', at <http://www.iisg.nl/~landsberger/dxpt.html>

**Landsberger, Stefan**, 'Jiang Zemin Theory ("Three Represents")', at <http://www.iisg.nl/~landsberger/jzmt.html>

**Legal Services News**, 'Suggestion letter petitioning for the abolition of Heilongjiang Province's letters and complaints internment and deportation regulation (*Qingqiu feizhi Heilongjiang sheng xinfang shourong qiansong guiding jianyi*, 请求废止黑龙江省信访收容遣送工作法规建议书)', reprinted in *Legal Services News* (法律服务时报) of 22 August 2003, p. 4

**Li Cunpeng** (李存捧) and **Liu Guang'an** (刘广安), 'People's Mediation and Rights Protection (*Minjian tiaojie yu quanli baohu*, 民间调解与权利保护)', in Xia Yong 夏勇 (editor) *Toward an Age of Rights: A Perspective of the Civil Rights Development in China (Zou Xiang Quanli de Shidai: Zhongguo Gongmin Quanli Fazhan Yanjiu*, 走向权利的时代: 中国公民全力发展研究) (China University of Politics and Science Press (中国政法大学出版社): Beijing, 1999)

**Li Hongjun** (李红军), 'Background of the self-immolation of a complainant (*Shangfangzhe zimie de beihou*, 上访者自焚的背后)', 9 October 2003 at <http://www.nanfangdaily.com.cn/zm/20031009/xw/zy/200310090797.asp>

**Li Jia** and **Yu Gao** (记者李佳, 通讯员郁高), 'Anti-corruption office of Beijing City People's Procuracy reaches agreement with lawyers and will join forces with lawyers to fight corruption (*Beijing shi jian fantanju yu lüshi da xieyi, jiang yu lüshi xieshou fanfu*, 北京市检反贪局与律师订协议 将与律师携手反腐)', available at [http://news.xinhuanet.com/legal/2004-04/22/content\\_1433668.htm](http://news.xinhuanet.com/legal/2004-04/22/content_1433668.htm)

**Li Jinghua** (李京华), *Renshi jiufen zhecheng redian* (人事纠纷渐成热点), [http://news.xinhuanet.com/legal/2004-02/01/content\\_1293587.htm](http://news.xinhuanet.com/legal/2004-02/01/content_1293587.htm)

**Li Yaqiong** (李雅琼) 'China stands before a constitutionalist era (*Zhongguo zhanzai xianzheng jieduan menkou*, 中国站在宪政阶段门口)', Southern

Metropolitan (南方都市报), available at <http://www.nanfangdaily.com.cn/southnews/jwxy/200407310131.asp>

Li Yongjing and Li Huiwen (李永京, 李慧文), 'Two criminals creating disturbances at Tian'anmen convicted' (*Tian'anmen zhizao shiduan liang an fan bei pan xing*, 天安门制造事端两案犯被判刑, Xinhua, 28 November 2003), Xinhua, 28 November 2003, at [http://news.xinhuanet.com/legal/2003-11/28/content\\_1203464.htm](http://news.xinhuanet.com/legal/2003-11/28/content_1203464.htm)

Li Yu (李郁), Zhai Huimin (翟惠敏), 'Protecting citizens' legal rights and interests, benefiting citizens' activities in society – a reading of the Residents' Identity Card Law (*Baozhang gongmin hefa quanyi bianli gongmin shehui huodong*, 保障公民合法权益便利公民社会活动 ——解读居民身份证法, *Legal Daily* (法制日报) of 29 June 2003, at [http://www.legaldaily.com.cn/bm/2003-06/29/content\\_35161.htm](http://www.legaldaily.com.cn/bm/2003-06/29/content_35161.htm)

Lian Yue (连岳), "'Taking the blame and resigning" is of course not voluntary (引咎辞职本就不是自愿的)', *Southern Weekend* (南方周末) of 6 May 2004

Lin Chufang (林楚方), 'Sentenced to death in first instance but escaped with his life in second instance – an investigation into the overturning of the verdict in Liu Yong's case (*Yi shen pan sixing ershen taochu shengtian, liu yong an gaipan diaocha*, 一审被判死刑二审逃出生天 刘涌案改判调查)', 28 August 2003, Renminwang website at <http://www.people.com.cn/GB/shehui/1063/2041979.html>

Lin Jie (林洁), 'In the case of 25 internees burnt to death in a car the court hearing has been adjourned indefinitely (*25 ming bei shourong renyuan shaosi [zai] chezhong anjian tingshen bei wuxianqi tuichi*, 25名被收容人员烧死车中案件庭审被无限期推迟)' at [http://news.xinhuanet.com/legal/2003-8/27/content\\_1047117.htm](http://news.xinhuanet.com/legal/2003-8/27/content_1047117.htm)

Liu Guang'an (刘广安), Li Cunpeng (李存捧), 'People's Mediation and Rights Protection (*Minjian tiaojie yu quanli baohu*, 民间调解与权利保护)', in Xia Yong 夏勇 (ed) *Toward a Time of Rights: A Perspective of the Civil Rights Development in China* (*Zou Xiang Quanli de Shidai: Zhongguo Gongmin Quanli Fazhan Yanjiu*, 走向权利的时代: 中国公民全力发展研究) (Beijing: 1995), 285

Liu Jinyou (刘金友), 'The right to silence, the value of defendants' or suspects' statements and 'zero confession' (*Chenmoquan, kougong jiazhi yu "ling kougong"*, 沉默权、口供价值与“零口供”), published by *China Legal Daily*, 10 February 2002, at [http://www.legaldaily.com.cn/gb/content/2002-02/10/content\\_31946.htm](http://www.legaldaily.com.cn/gb/content/2002-02/10/content_31946.htm)

Liu, Nanping, 'A Vulnerable Justice: Finality of Civil Judgements in China', 13 (2000) *Columbia Journal of Asian Law* 35

**Liu Yan**, 'Rule of Law in China: An Ever-Changing View', a paper presented at the conference *Political Practice in Modern China* in Churchill College, Cambridge, 26-27 June 2002

**Liu Zhengyou** (刘正有) from Zigong City, Da'An District, Hongqi village in Sichuan Province, 'I am telling the truth to the General Secretary and to the Premier (*Wo xiang zongshuji, zongli jiang shihua*, 我向总书记, 总理讲实话)', unpublished, dated 2 November 2003

**Lu, Maggie**, 'Begging for a living', in *Shanghai Star*, 14 August 2003, available at <http://www.chinadaily.com.cn/star/2003/0814/fo4-1.html>

**Lü Xiaobo** (吕晓波), public lecture at Tsinghua University on the rural tax burden, 26 September 2003

**Luban, David**, 'Settlements and the Erosion of the Public Realm', (1995) 83 *Georgetown Law Journal* 2619

**Lubman, Stanley**, 'The Study Of Chinese Law In The United States: Reflections On The Past And Concerns About The Future', 2 (2003) *Washington University Global Law Review* 1

**Ma Fuyun** (马福云), 'The definition of the status of resident entitled to vote against the background of the household registration reform (*Huji gaige Beijing xia the xuanmin zige jieding*, 户籍制度改革背景下的选民资格界定 (unpublished draft)

**Mao Guofang** (毛国芳), 'On introducing [extrajudicial] pre-trial mediation in criminal matters that can be privately prosecuted (*xingshizisu anjian shezhi qianzhi tiaojie chengxu de gouxian*, 刑事自诉案件设置前置调解程序的构), 2 September 2002, posted at <http://www.shefy.com/Discuss/detail.asp?id=134>

**Mao Zedong** (毛泽东), 1957, 'On the Correct Handling of Contradictions Among the People', (translation) in Selden, Mark, *The People's Republic of China: A Documentary History of Revolutionary Change*, New York Monthly Review Press, 1979

**Menkel-Meadow, Carrie**, 'Is the Adversary Model Really Dead? Dilemmas of Ethics [and] Professional Responsibility as Legal Institutions and Roles Evolve', *Current Legal Problems* lecture delivered on 13 May 2004 at UCL, forthcoming in *Current Legal Problems*

**Ministry of Supervision**, *Introduction to the Ministry of Supervision of the People's Republic of China/中华人民共和国监察部简入* (*Zhonghua renmin gongheguo jianchabu jianru*, bilingual, received in March 2003

**Niu Xiaobo** (牛晓波), 'The intricate entanglement of judges and lawyers (*Faguan yu lüshi de weimiao jiuchan*, 法官与律师的微妙纠缠)', 30 June 2004

in 21<sup>st</sup> Century Herald (21 世纪经济报道) at <http://www.nanfangdaily.com.cn/jj/20040701/zj/200406300017.asp>

**Palmer, Michael**, 'The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation', in Butler, W.E. (ed.), *Yearbook on Socialist Legal Systems* (Juris Pub Inc: New York, 1987)

**Palmer, Michael**, "'So, good people too may litigate?'" Individual justice, legal change and the family in contemporary China', inaugural lecture at SOAS on 12 June 2002

**Pang Ran** (庞然) [member of] the [Communist] Party's Committee of Chongqing Jiangjin City, Dushi Town (重庆江津市杜市镇党委), "'Porridge" Su tells who is in the wrong' ("Su Xini" duan li, "苏稀泥" 断理)', (2003) *People's Mediation (Renmin Tiaojie, 人民调解)*, September issue, p. 2

**Peerenboom, Randall**, 'What's Wrong with Chinese Rights: Toward a Theory of Rights with Chinese Characteristics', in Alston, Philip, *Human Rights Law* (Dartmouth: Aldershot, 1996), 293

**Peerenboom, Randall**, 'Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China', 2002 *Michigan Journal of International Law* Vol. 23, 1.

**Perry, Stephen**, 'Hart's Methodological Positivism' in Coleman, Jules (editor), *Hart's Postscript* (Oxford University Press: Oxford, 2001), p. 311

**Pildes, Richard**, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism', (1998) *Oxford Journal of Legal Studies* 725

**Pildes, Richard**, 'Dworkin's Two Conceptions of Rights', (2000) *Oxford Journal of Legal Studies* 309

**Putnam, Hilary**, 'Fact and Value', chapter 6 in *Reason, Truth and History* (Cambridge University Press: Cambridge, 1981)

**Qin Chuan**, "'Take Blame and Resign" More Popular', *China Daily* 8 March 2004, at [http://www.chinadaily.com.cn/english/doc/2004-03/08/content\\_312764.htm](http://www.chinadaily.com.cn/english/doc/2004-03/08/content_312764.htm). 连岳专栏 引咎辞职本就不是自愿的 *Southern Weekend* 6 May 2004. 郑致让"引咎辞职"条条兑现 18 May 2004, [http://news.xinhuanet.com/comments/2004-05/18/content\\_1475132.htm](http://news.xinhuanet.com/comments/2004-05/18/content_1475132.htm)

**Qin Qianhong** (秦前红) 'On the implementation of the two International Human Rights Conventions and on the changes in [of] the Chinese Constitution (*Lun liangge guoji renquan gongyue de shishi he zhongguo xianfa bianqian*, 论两个国际人权公约的实施和中国宪法变迁)', at [http://www.law-lib.com.cn/lw/lw\\_view.asp?no=1724](http://www.law-lib.com.cn/lw/lw_view.asp?no=1724).

**Quine**, Willard van Orman, 'Two Dogmas of Empiricism', (1950), reprinted in *From a Logical Point of View. Nine Logico-Philosophical Essays* (Harvard University Press: Cambridge, Massachusetts, 1980)

**Randle Edwards**, R., 'The Role of Case Precedent in the Qing Judicial Process As Reflected in Appellate Hearings', in Hsu, Stephen (editor), *Understanding China's Legal System. Essays in Honour of Jerome Cohen* (New York: 2003)

**Rawls**, John, 'The Idea of an Overlapping Consensus', (1987) *Oxford Journal of Legal Studies*

**Raz**, Joseph, 'Two Views of the Nature of the Theory of Law: A Partial Comparison, 1998 *Legal Theory* 249

**Report on the Fourth Conference on People's Mediation Work** (*di si ci quanguo renmin tiaojie gongzuo huiyi gongzuo baogao*, 第四次全国人民调解工作会议工作报告), 27 May 2000, <http://www.legalinfo.gov.cn/joa/mainnote/mt200005.htm>

**Rickett**, William, 'Voluntary Surrender and Confession in Chinese Law: the Problem of Continuity', (1971) 30 *Journal of Asian Studies* 797

**Scanlon**, Thomas, 'Contractualism and Utilitarianism' in Sen, Amartya, and Williams, Bernard, *Utilitarianism and Beyond* (Cambridge University Press: Cambridge, 1982)

**Secret China Report**, 'Xiao Qiang on the suppression and opposition to suppression of news', *Xiao Qiang: zhongguo xinxi fengsuo he fanfengsuo fenxi*, 萧强: 中国信息封锁和反封锁分析), available at <http://www.secretchina.com/news/articles/4/4/19/63661.html>

**Secret China Report** (看中国报道), (*Beijing banling: jinzhi minzhong shenyuan han kouhao, la hengfu*, 北京颁令: 禁赴京民众申冤时喊口号、拉横幅, 3 April 2004, , at <http://www.secretchina.com/news/articles/4/4/3/62766.html>

**Secret China Report** (看中国报道), 'Qingqing: Xinhuaawang and Renminwang unite – an attack spearheaded against Jiang Zemin (*Qingqing: Xinhuaawang renminwag lianshou, maotou zhixiang Jiang Zemin*, 青晴: 新华网人民网联手矛头指向江泽民) 21 April 2004, at <http://www.secretchina.com/news/articles/4/4/21/63810.html>

**Shen Jixuan** (沈纪轩), 'Vice Governor of Anhui Province Wang Huaizhong deprived of party membership, handed over to the law enforcement authorities (*Anhui sheng fushengzhang Wang Huaizhong bei kaichu dangji, yisong sifa jiguan*, 安徽省原副省长王怀忠被开除党籍 移送司法机关, report of 29 September 2003 at [http://news.xinhuanet.com/legal/2003-09/29/content\\_1106674.htm](http://news.xinhuanet.com/legal/2003-09/29/content_1106674.htm)

**Sheng Xueyou** (盛学友) and **Wang Changfeng** (王长风), *Legal Services News* (法律服务时报) of 22 August 2003

**Shi Fei** (石飞), 'Welcoming the demise of the principle "who makes a clean breast will be treated leniently, who obstinately resists will be treated harshly" (*Huansong "tanbai congkuan, kangju congyan" tuiwei*, 欢送“坦白从宽抗拒从严”退位)', 9 December 2003, available at [http://www.ah.xinhuanet.com/xinwen/2003-12/09/content\\_1313545.htm](http://www.ah.xinhuanet.com/xinwen/2003-12/09/content_1313545.htm)

**Shi Fengyi**, '*Tantan Renmin Tiaojie de jige renshi wenti* (谈谈人民调解的几个认识问题) [translated as 'Talks on the Understanding Problems of People's Mediation'], *Legal Studies* (法学研究) 1988 no. 4, 75

**Shi Yin** (师饮), 'Tianjin: an internment station "returned to its origins [its original purpose]" (*Tianjin: bei "huanyuan" de shourong zhan*, 天津: 被“还原”的收容站)', *Southern Weekend* (南方周末), 26 June 2003, available at <http://www.nanfangdaily.com.cn/zm/20030626/cs/zt/200306260708.asp>

**Sinolaw**, 'Central Political and Legal Committee emphasises need further to build up the Legal and Political [committee] contingent', dealing with the enforcement of measures against conduct 'contrary to [party] discipline or contrary to law' (*Zhongyang zhengfawei tongzhi qiangdiao: yao jin yi bu jiaqiang zhengfa duiwu jianshe*, 中央政法委通知强调:要进一步加强政法队伍建设) of 15 July 2003 at <http://www.law.gov.cn/news/jryw/jryw/715200391018.htm>

**Stavropoulos**, Nicos, 'Hart's Legal Positivism', in Coleman (ed.), *Hart's Postscript* (Oxford University Press: Oxford, 2001)

**Sun Chunying** (孙春英), *Zouchu "weicheng" – huji zhidu gaige xilie baodao* 走出“围城”——户籍制度改革系列报道 (third part), 21 September 2001, at [http://www.legaldaily.com.cn/gb/content/2001-09/19/content\\_24489.htm](http://www.legaldaily.com.cn/gb/content/2001-09/19/content_24489.htm)

**Sun Juyou**, (孙聚友), *The Confucian School's Philosophy of Management* (*Rujia guanli zhexue xinlun* (儒家管理哲学新论) (Jinan: 2003).

**Sun Yequn** (孙业群), 'How difficult is it really to be a criminal defence lawyer – thoughts about the problems faced by lawyers participating in the criminal litigation process (*Zuo yige xingbian lüshi jiujing you duo nan – lüshi canyu xingshi susong huodong youguan wenti de sikao* 做一个刑辩律师究竟有多难——律师参与刑事诉讼活动有关问题的思考)', (2003) *Chinese Lawyer* (*Zhongguo Lüshi*, 中国律师) April issue, p. 67; available at <http://www.hanjilawyer.com.cn/juanji/juang3-76.htm>

**Tanner**, Murray Scot, 'China Rethinks Unrest', 27 (2004) *The Washington Quarterly* 137

**The Central News Agency**, 'China suicide rate is 2.3 times the global average', posted on 18 November 2003 at <http://www.asianresearch.org/articles/1697.html>

**The Guardian** of 19 March 2004, 'China Sentences Former Paper Managers'

**Tian Yu** (田雨), *Xinhua* (新华), 北京将取消境外人员暂住证 21 September 2003, at <http://211.100.18.62/fzdt/xwnr.asp?id=10391>

**Waldron**, Jeremy, 'The right to do wrong', reprinted as chapter 3 in Waldron, *Liberal Rights. Collected papers 1981-1991* (Cambridge University Press: Cambridge, 1993)

**Waldron**, Jeremy, 'Inalienable Rights', in (1999) *Boston Review*, April/May issue, available at <http://www.bostonreview.net/BR24.2/waldron.html>

**Waldron**, Jeremy, 'Normative (or Ethical) Positivism' in Coleman, Jules (editor), *Hart's Postscript* (Oxford University Press, Oxford, 2001), p. 410

**Waldron**, Jeremy, 'Pildes on Dworkin's Theory of Rights', (2000) *Oxford Journal of Legal Studies* 302

**Wang Changfeng** (王长风), 'The resolution of contradictions [conflicts, in society] rests on building up a healthy legal system (*Jiejue maodun zaiyu jianquan fazhi*, 解决矛盾在与健全法制)', in *Legal Services News* (法律服务时报) of 22 August 2003, at p. 4

**Wang Lei** (王磊) in his article 'Examination of the constitutionality of internment and deportation (*Shourong qiansong de xianfaxing shencha*, 收容遣送的宪法性审查) 29 (2003) *Huadong Political and Legal Institute Journal* (华东政法学院学报) at p. 97

**Wang Xixin** (王锡锌), 'Principles, Agreement and [political] governance – a study of the possibility and appropriateness of use of ADR in the administrative process (*Guize, heyi yu zhili – xingzheng guochengzhong shiyong ADR de kenengxing yu todangxing*, 规则、合意与治理——行政过程中 ADR 适用的可能性与妥当性研究 )' at [http://www.chinalawedu.com/news/2004\\_4/10/1455281654.htm](http://www.chinalawedu.com/news/2004_4/10/1455281654.htm)

**Wang Xiyong** (王溪勇), 'Why not choose court to protect one's rights? (*Weiquan weihe bu xuan fayuan?*, 维权为何不选法院?)', in *Nanfang Ribao* (南方日报) of 20 July 2004, available at <http://www.nanfangdaily.com.cn/southnews/spqy/200407200003.asp>

**Wang Zhenmin** (王振民), LL.M. classes on Constitutional Law at Tsinghua University Law School, September - November 2003

**Wang Zhenmin** (王振民), 'Can the Chinese Constitution be applied in Court?' (*Shilun xianfa kefou jinru susong*, 试论中国宪法可否进入诉讼)', available at <http://202.99.23.246/wsrmlt/jbzl/wangzhenmin/wzm4.html>

**Wiggins**, David, 'Neo-Aristotelian Reflections on Justice', 113 (2004) *Mind* 477 and his prior 'A Neo-Aristotelian Approach to Justice: How Would It Go?', public lecture given at Cambridge on 11 July 2002

**Williams**, Bernard, *Ought, Must and the aims of morality*', public lecture given at Oxford on 28 October 2002

**Williams**, Bernard, 'Justice as a Virtue', in Rorty, Amelie (editor), *Essays on Aristotle's Ethics* (Berkeley: 1980)

**Wu Jun** (吴俊), 'Second instance judgement for former manager of Southern Metropolitan Daily changes sentence to eight years, *Nanfang dushibao an ershen xuanpan, yuan zongjingli Yu Huafeng gaipan 8 nian*, 南方都市报二审宣判原总经理喻华峰改判 8 年', 15 June 2004, at [http://news.xinhuanet.com/legal/2004-06/15/content\\_1526906.htm](http://news.xinhuanet.com/legal/2004-06/15/content_1526906.htm)

**Wu Nan** (武楠), 'The courts should set up internal administrative courts (*Fayuan neibu ying sheli xingzheng fayuan*, 法院内部应设立行政法院)', *China Legal Daily* 3 July 2003, at [http://www.legaldaily.com.cn/bm/2003-07/03/content\\_35920.htm](http://www.legaldaily.com.cn/bm/2003-07/03/content_35920.htm)

**Wu Xue'an** (吴学安), 将户籍改革进行到底, [http://www.legaldaily.com.cn/bm/2003-06/16/content\\_33126.htm](http://www.legaldaily.com.cn/bm/2003-06/16/content_33126.htm)

**Xiao Wenfeng** (肖文峰), 'Trial opened in the case of inflicting bodily harm on Sun Zhigang resulting in his death; more than twenty responsible persons have received disciplinary measures (*Sun Zhigang an bei guyi shanghai zhisi kating 20 yu zeren ren shou chufen*, 孙志刚被故意伤害致死案开庭 20 余责任人受处分)', *Xinhua* 5 June 2003, at [http://news.xinhuanet.com/legal/2003-06/05/content\\_904317.htm](http://news.xinhuanet.com/legal/2003-06/05/content_904317.htm)

**Xiao Yang**, English language edition of *China Daily*, 12 April 2004, 'Scrapping Article 306 would make law fairer'

**Xie Xiaoguo** (谢孝国), 'An eighty-year-old interned in Shenzhen gets some words of apology after two years of troublesome litigation (*Baxun laoren Shenzhen bei shourong, liangnian guansi feixin tao shufa*, 八旬老人深圳被收容两年官司费心讨说法)', *21 Century Herald Tribune*, 25 June 2003, at <http://news.21cn.com/guangdong/tq/2003-06-25/1088852.html>

**Xinhua**, report on the recent *White book on Employment*, 'Chinese White Book Situation and policies regarding Employment published (*zhongguo de jiuye zhuangkuang he zhengce baipishu fabiao*, 《中国的就业状况和政策》白皮书发表), 26 April 2004, available at <http://www.jcrb.com/zyw/n222/ca236650.htm>



**Xinhuaawang** 'Over 1500 workers in Beijing seek advice on protecting their rights – delayed wages become the hottest topic (*Beijing 1500 duo ming zhigong zixun falü weiquan – tuoqian gongzi cheng redian*, 北京 1500 多名职工咨询法律维权 拖欠工资成热点 ), Xinhuaawang on 27 October 2003, available at [http://news.xinhuanet.com/legal/2003-10/27/content\\_1143630.htm](http://news.xinhuanet.com/legal/2003-10/27/content_1143630.htm)

**Xinhuaawang**, Shanghai: 85% de laodong zhengyi anjian laodongzhe shengsu (上海: 85 % 的劳动争议案件劳动者胜诉), available at [http://news.xinhuanet.com/legal/2004-05/01/content\\_1450486.htm](http://news.xinhuanet.com/legal/2004-05/01/content_1450486.htm)

**Xinhuaawang**, 'To climb up a high rise building and "kill oneself" no longer works (Xi'an: palou "zisha" xing bu tong le, '西安: 爬楼"自杀"行不通了)', at [http://news.xinhuanet.com/legal/2004-04/27/content\\_1442111.htm](http://news.xinhuanet.com/legal/2004-04/27/content_1442111.htm)

**Xinhuaawang/Wuhan Morning Post**, Yi shao nian zai Beijing Luoyang bei liangdu shourong chuzhan liang nian xialuo bu ming, 一少年在北京洛阳被两度收容 出站两年下落不明 ' from *Wuhan Morning Post*, at [http://news.xinhuanet.com/legal/2003-07/09/content\\_987615.htm](http://news.xinhuanet.com/legal/2003-07/09/content_987615.htm)

**Xinhuaawang**, 'The first constitution regulated [contained] the "right to move freely" – calls in the media to restore it', (*Shoubu xianfa ceng guiding "qianxi ziyou – meiti kanwen huyu hui fu*, 首部宪法曾规定"迁徙自由权" 媒体刊文呼吁恢复), 8 April 2004 , available at <http://taiwan.qianlong.com/23/2002-4-8/45@191772.htm>

**Xinhuaawang Xinhua News**, 25 July 2003, 'China is undergoing a new round of reforms of the household registration system (*Zhongguo zheng tuixing xin yi lun gaige*, 中国正推行新一轮户籍制改革)' at [http://news.cycl.com/gb/news/2003-07/25/content\\_703810.htm](http://news.cycl.com/gb/news/2003-07/25/content_703810.htm)

**Xinhuaawang** reproduced an article of the *Morning Post* (新闻晨报) reporting the arrest of seven Shanghai citizens come to the capital. 'Shanghai has detained seven criminal suspects for entering Beijing and causing public disturbance under the name of complaint visits (*Shanghai xingshi juliu qi ming shexian yi jinjing shangfang wei ming juzhong zishizhe*, 上海刑事拘留 7 名涉嫌以进京上访为名聚众滋事者 ) 21 October 2003, available at [http://news.xinhuanet.com/legal/2003-10/21/content\\_1133521.htm](http://news.xinhuanet.com/legal/2003-10/21/content_1133521.htm)

**Xinhuaawang Beijing** (*Shandong qunzhong fengdu sihuanlu – Beijing liang ming beigaoren bei tiqi gongsu*, 煽动群众封堵四环路 京城两名被告人被提起公诉)', 15 May 2004 at Xinhuaawang, [http://news.xinhuanet.com/legal/2004-05/14/content\\_1469086.htm](http://news.xinhuanet.com/legal/2004-05/14/content_1469086.htm)

**Xinhuaawang**, 'In Beijing [judges] work overtime to clear away cases that are over the time limit set for handling, judges who cannot cope will not receive approval [praise] (*Beijing jiaban qingli chaoshenxian anjian, qingli bu ban faguan bu yu pingyou*, 北京加班清理超审限案件 清理不力法官不予评优), 21

October 2003 at [http://news.xinhuanet.com/legal/2003-10/21/content\\_1133800.htm](http://news.xinhuanet.com/legal/2003-10/21/content_1133800.htm)

**Xinhua** (Xinhua), 'The Household registration reforms: marked successes of the reforms in our country in recent years (户籍改革: 我国户籍管理制度改革近年来成效显著)', at [http://www.chinapop.gov.cn/rkx/zxbd/t20040326\\_10545.htm](http://www.chinapop.gov.cn/rkx/zxbd/t20040326_10545.htm)

**Xinlang Guancha** (新浪观察, New Wave Survey), 'Special visit paid to the vice president of China's Legal Academic's Society Chen Guangzhong: the conversion into suspended death sentence was an expression of the spirit of the rule of law, (*Zhuanfang Zhongguo faxehui huifuzhang Chen Guangzhong: gaipan sihuan tixianle fazhi jingsheng*, 专访中国法学会副会长陈光中: 改判死缓体现了法治精神)', 24 December 2003, available at <http://www.law-thinker.com/detail.asp?id=1900>

**Xu Anbiao** (许安标), 'Legislative powers according to the *Legislation Law*', *Legal Daily* (法制日报) of 4 June 2000, available at <http://www.jc.gov.cn/personal/ysxs/fnsx1/fnsx979.htm>

**Xu Haitao** (许海涛), 'Shijiazhuang entirely removes the [bamboo] fences (*Shijiazhuang quanmian chechu huji fangli* 石家庄全面撤出户籍藩篱)', 13 August 2001, available at <http://www.unn.com.cn/GB/channel19/49/117/200108/13/92230.html>

**Xu Shengru** (许圣如), 'The "three rural problems" to be included in important [political] agenda, ("三农"问题将列入重要议程)', in *21<sup>st</sup> Century Economic Herald* (21 世纪经济报道) of 13 October 2003, at <http://www.nanfangdaily.com.cn/jj/20031013/jd/200310130754.asp>

**Xue Yong** (薛涌) in 'How much does the "Traditionalist Party" really understand of tradition? ("*Chuantongpai*" dui *chuantong liaojie duoshao?*, 传统派"对传统了解多少?)', in *Southern Metropolitan* (南方都市报) of 6 May 2004, available at <http://www.nanfangdaily.com.cn/southnews/spqy/200405060108.asp>

**Yang Jinzhi** (杨金志), 'Shanghai sets up a credibility record for lawyers to publish results of investigation and measures imposed within set time (*Shanghai wei lüshi jian "chengxin jilu" dingqi gongbu chachu jieguo*, 上海为律师建"诚信记录" 定期公布查处结果)', available at [http://news.xinhuanet.com/legal/2004-04/19/content\\_1427496.htm](http://news.xinhuanet.com/legal/2004-04/19/content_1427496.htm)

**Yang Liu** (杨柳), 'Dodgy legal products: an examination of two cases of local court mediation (*Mohu de falü chanpin: dui liang qi jiceng fayuan tiaojie anjian de kaocha*, 模糊的法律产品: 对两起基层法院调解案件的考察)' in Jiang Shigong (强世功, editor), *Mediation, Legality and Modernity: Mediation in China (tiaojie fazhi yu xiandaixing: zhongguo tiaojie zhidu yanjiu*, 调解, 法制与现代性: 中国调解制度研究) (Beijing: 2001), 484

**Yang Lixin** 杨立新, ‘Procuratorial Supervision over Civil and Administration Procedures and Justice of Trial[adjudicative or judicial justice] (*Minshi xingzheng susong jiancha yu sifa gongzheng*, 民事行政诉送检查监督与司法公正)’ (2000) *Faxue Yanjiu* vol. 4 p. 45

**Yang Rongxin** (杨荣新), ‘Widening the scope of mediation, determining the legal effects of mediation settlements (*Tuohuang renmin tiaojie fanwei queding tiaojie xieyi xiaoli*, 拓宽人民调解范围 确定调解协议效力)’, posted on 30 September 2002 at <http://www.rmfb.com/public/detail.php?id=42292>

**Yao Gang** (姚刚), ‘On the four big lawyer accomplices of corruption: from Tian Wenchang to Zhang Jianzhong, Li Kuisheng and Wu Deli (*Guodasi “fubai bangxiong” lüshi:: cong Tian Wenchang, Zhang Jianzhong, Li Kuisheng dao Wu Deli* 国四大“腐败帮凶”律师: 从田文昌、张建中、李奎生到吴德立)’, 26 January 2004, available at <http://www.peacehall.com/news/gb/china/2004/01/200401260718.shtml>

**Ye Zhiqiu** (叶之秋), ‘My own experience of internment (*Wo de yi ci shourong jingli*, 我的一次收容经历)’, *Southern Weekend*, 19 June 2003, available at <http://www.nanfangdaily.com.cn/zm/20030619/wh/bxjs/200306191190.asp>

**Yifazhiguo** (website), report posted on 30 March 2004, ‘To do good work establishing a lawyer’s Party member organisation and enhancing the role of Party members as examples (*zuohao lüshi dangjian gongzuo, fahui dangyuan mofan zuoyong*’ (做好律师党建工作 发挥党员模范作用) at <http://www.yfzs.gov.cn/2004-03-3014:40:27>

**Yu Meisun** (俞梅荪), ‘Tangshan Police investigates all the peasants who signed the petition “Ten Thousand People broken” - every person has put themselves in danger (*Tangshan jingfang zhuicha “wan ren qian” qianming nongmin, ren ren ziwei*, 唐山警方追查「万人折」签名农民人人自危)’, 14 April 2004 at <http://www.seretchina.com/news/articles/4/4/14/63394.html>

**Zhang Wen** (章文), ‘Why can we only ‘reside temporarily’ in our own country?’ (*Wei Shenme zai ziji de zuguo women zhi neng zhanzhu?*, 为什么在祖国我们只能站住)’ *Southern Window* (南风窗), 19 November 2001, reprinted in Wang Zhenmin (王振民), *Case Reader in Constitutional law* (中国宪法案例教程 Tsinghua University, Beijing: 2002) p. 115

**Zhang Yansheng** (张燕生), a police officer in a district of Changde City in Hunan province, in a contributio to ‘Legal System on the line: torture (*Fazhi zai xian: xingxun bigong*, 法制在线: 刑讯逼供)’, *Renminwang*, 22 October 2003, at <http://www.people.com.cn/GB/14576/15157/2146427.html>

**Zhao Huiying** (赵慧英), ‘State Council turns out a “View” to promote reform in the smaller cities and towns (*Guowuyuan chutai “yijian” tuijin xiao chengzhen*

*huji gaige*, 国务院出台《意见》推进小城镇户籍制度改革), *China Macroeconomic News Net* (中国宏观经济信息网) of 23 August 2001 at <http://www.macrochina.com.cn/zhzt/000093/005/20010823017321.shtml>

**Zhao Ling** (赵凌), 'Ten years of eviction tragicomedy (*chaiqian shinian beixiju*, 拆迁十年悲喜剧)' in *Southern Weekend* (南方周末) of 4 September 2003, at <http://news.sina.com.cn/c/2003-09-04/1131691557s.shtml>

**Zhao Xiang** (赵翔) and **Wan Xuezhong** (万学忠), 'Three citizens suggest a review of the 'internment law [sic], and experts enthusiastically affirm [the appropriateness of suggestion] (*San Gongmin jianyi shencha "shourongfa", youguan zhuanjia jiji kending*, 三公民建议审查《收容法》有关专家给予积极肯定) *Legal Daily* (法制日报), 18 May 2003

**Zheng Zhi** (郑致), 'Let us clearly explain "Taking the blame and resigning" article by article (让“引咎辞职”条条兑现), 18 May 2004, available at [http://news.xinhuanet.com/comments/2004-05/18/content\\_1475132.htm](http://news.xinhuanet.com/comments/2004-05/18/content_1475132.htm)

**Zhou Limin** (周立民), 'Beijing law firm provides legal aid to Fuyang victims (*Beijing yi lüshishiwusuo wei Fuyang shouhaizhe tigong falü yuanzhu*, 北京一律师事务所为阜阳受害者提供义务法律援助), available at [http://news.xinhuanet.com/newscenter/2004-04/23/content\\_1436680.htm](http://news.xinhuanet.com/newscenter/2004-04/23/content_1436680.htm)

**Zhou Yesheng** (周业胜), 'On appropriately handling "collective complaints visits" (*Tuoshan chuli "jitifang" de celue*, 妥善处理“集体访”的策略)' *Zhengyiwang*, 26 March 2003, at <http://www.chinacourt.org/public/detail.php?id=109099>

**Zhu Changli** (朱昌礼), 'Study on problems with undue intervention in mediation (*Guanyu renmin tiaojie ganyu wenti de yanjiu*, 关于人民调解干预问题的研究, originally translated as 'Some Problems of Mediation by Common People in China'), (1999) *Faxue Yanjiu* (法学研究) no. 5, 79

**Zhu Xiaozhen** and **Fang Longhua**, "Pre-litigation mediation:" much trouble, little benefit – on reasonings by the Mufan City Intermediate Court (*Suqian tiaojie" bi duo li shao – yu Mufanjiang shi zhongji fayuan shangque*, 诉前调解弊多利少 -- 与牡丹江市中级人民法院商榷), (1994) *Faxue* (法学) no. 4, 20